

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP); 08-01420(JMP)(SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

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In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

April 27, 2010

9:38 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

VERITEXT REPORTING COMPANY

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HEARING re Motion by Barclays Capital Inc. for an Order
Compelling Documents from LBHI, the Trustee, the Creditors'
Committee and their Financial Advisors Deloitte, FTI, Alvarez &
Marsal, and Houlihan Lokey

HEARING re Statement of the Securities Investor Protection
Corporation in Support of Trustee's Motion for Relief Pursuant
to the Sale Orders or, Alternatively, For Certain Limited
Relief Under Rule 60(b)

HEARING re Objection of HWA 555 Owners, LLC to the Motions of
Lehman Brothers Holdings Inc., James W. Giddens as Trustee for
Lehman Brothers Inc., and the Official Committee of Unsecured
Creditors of Lehman Brothers Holdings Inc. to Modify the
September 20, 2008 Sale Order and for Other Relief

HEARING re Objection of SunGard Entities to the Motion of the
Trustee for Relief Pursuant to Sale Orders or, Alternatively,
for Certain Limited Relief Under Rule 60(b) and Reservation of
Rights

1
2 HEARING re Motion of Evergreen Solar, Inc. to Join in Motion of
3 Official Committee of Unsecured Creditors of Lehman Brothers
4 Holdings Inc.

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6 HEARING re Statement of the Bank of New York Mellon Trust
7 Company in Support of the Motions for (I) an Order Modifying
8 the September 20, 2008 Sale Order and Granting Other Relief and
9 (II) to Unseal Motions for Relief from September 20, 2008 Sale
10 Order (and Related SIPA Sale Order)

11
12 HEARING re Objection of SunGard Entities to (1) the Motion of
13 the Debtors for an Order Modifying the September 20, 2008 Sale
14 Order and Granting Other Relief and (2) the Motion of Official
15 Committee of Unsecured Creditors of Lehman Brothers Holdings
16 Inc.

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18 HEARING re Joint Statement And Reservation Of Rights Of The
19 Bank Of Tokyo-Mitsubishi UFJ, Ltd. And Lloyds TSB Bank, plc In
20 Connection With (I) Motions Of Lehman Brothers Holdings, Inc.,
21 The Official Committee Of Unsecured Creditors, And James W.
22 Giddens, As Trustee For Lehman Brothers, Inc., For Certain
23 Relief Pursuant To The September 20, 2008 Sale Orders; And (II)
24 Motion Of Barclays Capital Inc. To Enforce The Sale Orders And
25 Secure Delivery Of Undelivered Assets

HEARING re Australia & New Zealand Banking Group LTD's Letter
Regarding Rule 60 Proceedings

HEARING re LibertyView's: (A) Joinder to (i) the SIPA Trustee's
Motion, (ii) the Committee's Motion; and (iii) LBHI's Motion
for Relief from the Sale Orders or, Alternatively, for Certain
Limited Relief Under Rule 60(b); and (B) Objection to Barclays
Capital Inc.'s Motion to Enforce the Sale Order

HEARING re Joinder of Newport Global Opportunities to
LibertyView's: (A) Joinder to (i) the Trustees' Motion, (ii)
the Committee's Motion; and (iii) LBHI's Motion for Relief from
the Sale Orders or, Alternatively, for Certain Limited Relief
Under Rule 60(b); and (B) Objection to Barclays Capital Inc.'s
Motion to Enforce the Sale Order

HEARING re Motion of Debtor to Modify the September 20, 2008
Sale Order and Granting Other Relief

HEARING re Motion of the Trustee for Relief Pursuant to the
Sale Orders or, Alternatively, for Certain Limited Relief Under
Rule 60(b)

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HEARING re Motion of Official Committee of Unsecured Creditors
of Lehman Brothers Holdings Inc., Authorizing and Approving (a)
Sale of Purchased Assets Free and Clear of Liens and Other
Interests; and (b) Assumption and Assignment of Executory
Contracts and Unexpired Leases, Dated September 20, 2008 (and
Related SIPA Sale Order) and Joinder in Debtors and SIPA
Trustees' Motions for an Order Under Rule 60(b) to Modify Sale
Order

HEARING re Motion of Barclays Capital Inc. to Enforce the Sale
Order and Secure Delivery of All Undelivered Assets

HEARING re Trustee's Adversary Complaint

HEARING re LBHI's Adversary Complaint

HEARING re Creditors' Committee Complaint for Declaratory
Relief Pursuant to 11 U.S.C. Section 105(a) and 28 U.S.C.
Sections 2201, 2202 and for an Accounting

Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE COURT: Be seated, please. Good morning. As I indicated at the close of yesterday's hearing, I'm prepared to rule this morning on the Barclays discovery motion and that's how we're going to begin. Here's my ruling:

The discovery motion brought by Barclays is the latest version of its ongoing efforts to obtain documents from each movant that has which documents had been withheld on grounds of privilege. Barclays' earlier motion from December 2009 based on alleged at issue waiver, requested documents withheld due to the attorney/client privilege. Barclays now focuses its attention more narrowly on materials prepared by the movants' professional advisors.

Barclays argues that there was a logical impossibility in the movants' cases in that the movants are unable to satisfy the legal standard governing their respective requests for leave without demonstrating that they were justifiably ignorant of the terms of the September 2008 sale transaction. To that end, Barclays styles the information requested as necessarily underpinning the movants' affirmative claims for relief.

It is plain to the Court, however, that Barclays present motion seeks information also for the purpose of bolstering or proving its defenses. The Court reaffirms the statements made at yesterday's hearing that for substantially reasons set forth in the Court's bench ruling from December 16,

1 2009, the current motion is denied with respect to information
2 requested from LBHI and the trustee.

3 In addition, with respect to the SIPA trustee, the
4 papers submitted by the parties failed to show that Deloitte &
5 Touche, the SIPA trustee's financial advisor, possesses any
6 pertinent information and it is clear that the trustee did not
7 rely on anything produced by Deloitte in his motion for 60(b)
8 relief. This conclusion is made even clearer to the Court by
9 virtue of certain of the deposition excerpts that were played
10 at yesterday's hearing.

11 Moreover, with respect to information requested by
12 Barclays from LBHI, Barclays has failed to demonstrate any
13 substantial need for any information not already produced
14 pursuant to the letter agreement dated October 14, 2009.
15 Indeed, counsel for LBHI confirmed on the record yesterday that
16 LBHI's production to Barclays includes work product generated
17 by Alvarez & Marsal through the period ending September 30,
18 2008, but also includes certain other documents from later
19 periods that relate to those documents.

20 As for the Barclays' motion with respect to documents
21 produced by the committee's financial advisors, particularly
22 Houlihan Lokey and FTI, The Court finds that Barclays'
23 substantial need for the information requested, at least in
24 this instance, overrides the work product protection asserted
25 by the committee.

1 The committee is a unique entity that purely is a
2 creature of the bankruptcy process. It acts in a
3 representative capacity as a watchdog for all creditors. As
4 such, the committee is a fiduciary that essentially functions
5 through its retained professionals. For that reason, as a
6 general matter, a committee's professionals should be entitled
7 to claim both the attorney/client privilege and the work
8 product privilege.

9 Nonetheless, because the committee is seeking relief
10 under Rule 60(b), the timing of what the committee knew and the
11 information available to it is at the heart of the committee's
12 motion. The issue, as framed by the committee itself in its
13 opening, is for the Court to see what the committee saw.

14 A salient feature of an affirmative motion for relief
15 under Federal Rule of Civil Procedures 60(b)(2) is that a
16 movant must show that it could not have discovered any new
17 evidence in time to move for a new trial.

18 In the Court's judgment, it would be unduly burdensome
19 for Barclays to be prevented from reviewing the analyses
20 created by Houlihan and FTI that informed the committee at the
21 time of the sale and thereafter. Barclays has shown that is
22 has a substantial need to challenge what the committee knew at
23 the time of the sale and what insights the committee developed
24 thereafter. Given that the Court, and not a jury, is the
25 finder of fact in this litigation, I'm in the position not to

1 be unduly influenced or prejudiced by the contents of any
2 disclosed work product. Accordingly, production of the
3 documents requested will cause no substantial harm to the
4 movants. In addition, the Court has a need to know any
5 relevant information with respect to the knowledge of the
6 committee inasmuch as that information may shed light on the
7 committee's entitlement to relief.

8 From the very beginning, transparency has been an
9 important objective in these proceedings. And that remains so
10 in my determination of this motion. Therefore, the Court
11 grants Barclays' motion only with respect to the committee. To
12 the extent any materials produced are confidential or involve
13 other matters subject to litigation, the parties should take
14 appropriate steps to protect those documents. That's the
15 ruling of the Court.

16 MR. TECCE: Your Honor, may I ask one question with
17 respect to the scope of Your Honor's ruling? The request by
18 Barclays is through March 31. And Your Honor had said that --

19 THE COURT: I thought it was through March 13th.

20 MR. TECCE: March 13th, I'm sorry. So is Your Honor's
21 ruling that it's our work product through March 13th? I only
22 say so because we did appear in December and we filed an
23 objection to a settlement motion raising our concern about the
24 sale transaction. So is there a time limit --

25 THE COURT: Well, regrettably, the papers filed by the

1 committee in opposition to the Barclays' motion didn't raise
2 the issue you're now raising. At least I don't remember seeing
3 that. It was simply a generalized objection based on work
4 product. There was no issue as to the scope of the request
5 until now.

6 MR. TECCE: Well --

7 THE COURT: Did I miss something or is this a new
8 thought on your part?

9 MR. TECCE: Well, it's not a new thought, Your Honor,
10 but I think you're correct. We did not specifically ask for a
11 pushback of the date. But I think that we did raise the issue
12 that we had appeared and objected in December as one of the
13 elements that we rely on to show time in this. But --

14 THE COURT: I understand.

15 MR. TECCE: - that is something different.

16 THE COURT: My ruling is not limited as to date
17 because no issue as to date was presented either in the papers
18 in opposition to the motion or at argument yesterday. So the
19 horse left that barn.

20 I do think, however, that the parties should meet and
21 confer regarding scope in much the same way that they would in
22 the granting of a garden variety discovery motion to the extent
23 that there are issues concerning materials created late in the
24 process.

25 Additionally, I treat this ruling as somewhat

1 exceptional. For reasons that I said, I believe that the
2 committee's professionals, as a general matter, are entitled to
3 assert the work product doctrine or the attorney/client
4 privilege. It's essential to the orderly operations of a well
5 functioning creditors' committee. And there's nothing here
6 that is intended to undermine that activity in this or any
7 other case.

8 But the nature of the relief being sought by all of
9 the movants is, to put it mildly, highly unusual. And for that
10 reason, I'm very concerned, as factfinder, that I have a
11 complete record and that the work product doctrine not be used
12 to withhold information that I need to see. If there's
13 information that I need to see that was created in March, I
14 want to see it. I don't want this to be litigation which is
15 won or lost on the basis of materials that had been
16 legitimately withheld but that are highly probative.
17 Accordingly, I want to see basically everything that there is
18 to see about this. And the reason that the committee ended up
19 in the crosshairs of this outcome is purely circumstantial.
20 The Deloitte evidence, to me, makes clear they have nothing to
21 offer. And the LBHI limited waiver makes clear that Barclays
22 has no substantial need for that information. So you're the
23 last person standing.

24 MR. TECCE: Fair enough, Your Honor. And I didn't
25 mean to disrupt the process. I just noted that for LBHI, they

1 stopped at September 30th. So --

2 THE COURT: I understand. Too late. Should have made
3 the argument before.

4 MR. TECCE: Thank you, Your Honor.

5 MR. BOIES: Your Honor, we have one totally unrelated
6 housekeeping matter. And that involves Barclays' chairman,
7 John Varley, and when he appears as a witness. We've been
8 trying to work this out with the other side and we've been
9 unable to do that. They have requested that he come on a week
10 from Friday. Now, we've agreed to bring all of the other
11 people that they've asked for on the dates that they asked for
12 them. However, Mr. Varley has some real scheduling problems.
13 And we first requested that he be put on early this week to
14 avoid those. They declined to do that. And what we would ask
15 is that he be permitted to testify when we resume in September
16 or August. He'll come at any time then. But he's got his
17 general shareholder meeting, annual general meeting on this
18 coming Friday. And then the British elections are the
19 following week. Because of his position, he needs to be there
20 then.

21 THE COURT: Is he running for anything?

22 MR. BOIES: He's not, Your Honor, but he's extremely
23 prominent person in the UK. And I think there's a widespread
24 belief that it would inappropriate for him not to be there.
25 Now, obviously, he is subject to the Court's direction. But we

1 see no prejudice to the other side in having this one witness
2 brought when we resume. He was not even going to be brought if
3 we stipulated to the admissibility of some documents. So he's
4 not somebody who's critical. He's going to be the last -- he's
5 going to be coming, by their request, on the last day of this
6 two week session in any event. So it's not like he's going to
7 provide some predicate for somebody else to testify.

8 So all we're saying is rather than put him on the last
9 day of this session, we put him the first day or any day of
10 their choosing in one of the additional sessions we're going to
11 have.

12 THE COURT: I prefer not to convert this housekeeping
13 item into something that's going to prompt time consuming
14 debate this morning. Let's simply reserve on the issue and
15 perhaps discuss it in a chambers conference setting. I can't
16 do it today but perhaps tomorrow at the close of regular
17 business and we can discuss scheduling at that time.

18 MR. BOIES: Thank you, Your Honor.

19 THE COURT: I presume we're continuing the cross-
20 examination of yesterday's witness.

21 (Pause)

22 THE COURT: Good morning, Mr. McDade.

23 THE WITNESS: Good morning.

24 RESUME CROSS-EXAMINATION

25 BY MR. BOIES:

1 Q. Good morning, Mr. McDade.

2 A. Good morning.

3 Q. I'd like to direct your attention now to the circumstances
4 of the week of September 15th, 2008. The markets at that point
5 during that week, throughout that week, were, as I think you've
6 described them, tumultuous and volatile, correct?

7 A. That's correct.

8 Q. And the market had changed dramatically from Friday to
9 Saturday and then again from Saturday to Sunday, again from
10 Sunday to Monday and changed again from Monday at 9 a.m. to
11 Monday at 11 a.m. and continued to change, correct?

12 A. Yes, they did.

13 Q. And the prices were changing dramatically, correct?

14 A. That's correct.

15 Q. Now, at your deposition, you said that all the markets had
16 shut down. Can you explain what you mean by that?

17 A. What I meant by markets shutting down, normal trading
18 volumes had shrunk to small percentages of their norm in all
19 asset classes from liquid asset classes, like government
20 securities, all the way through to the lesser liquid asset
21 classes. There was a tremendous amount of uncertainty and
22 really a shrinkage of capital that was being used by market
23 makers across the world.

24 Q. And you mentioned liquid and illiquid assets. And we
25 talked some about that yesterday. But it's the case that

1 originally Barclays had wanted to take as few illiquid assets
2 as possible, correct?

3 A. From the original transaction?

4 Q. Yes.

5 A. Prior to bankruptcy.

6 Q. Yes.

7 A. Yes, that's correct.

8 Q. And then when bankruptcy occurred, Barclays wanted to
9 avoid certain asset classes like the mortgage securities,
10 correct?

11 A. That's correct.

12 Q. On the other hand, during the week of September 15th,
13 Lehman was pushing Barclays to take, for example, these
14 mortgage securities, correct?

15 A. Lehman wanted to -- we wanted to move all of the assets
16 and balance sheet given our challenges in terms of being able
17 to manage any of the balance sheet, that's correct.

18 Q. And, in fact, you recognized that Barclays would have
19 preferred simply to buy the business without the assets,
20 correct?

21 A. I certainly reflected that that would have been a much
22 easier thing to do, to buy a great franchise, yes.

23 Q. And that would have limited Barclays' risk if they had
24 been able to do that, correct?

25 A. That's correct.

1 Q. But from Lehman's side, you didn't want them to do that,
2 correct?

3 A. We were, again, motivated to move the balance sheet
4 because of the challenges we were having operationally.

5 Q. And you recognized that Barclays, in the deal that was
6 ultimately done, was taking on a tremendous risk, correct?

7 A. Yes, they were.

8 Q. And that had to do with the size of the transaction, the
9 volatility of the markets, the illiquidity of some of the
10 assets and many other considerations, correct?

11 A. Yes.

12 Q. In order to come up with a price for the transaction or to
13 determine the consideration that Barclays was going to be paid,
14 you described a process that the Barclays and Lehman traders
15 went through in terms of valuing assets. Do you recall that/

16 A. Yes, I do.

17 Q. How did you come to your understanding of what that
18 process was?

19 A. I communicated through the head of all of our capital
20 markets businesses, which would have been Michael Gelband who
21 would have been individually responsible for the individual
22 business asset class managers at that point in time.

23 Q. And as the president of Lehman and senior negotiator in
24 the process, did you attempt to satisfy yourself that the
25 process in terms of valuing the assets was a process that you

1 thought was a sensible one?

2 A. I did attempt to reconcile with that, yes.

3 Q. Now, did you ever discuss with anyone at Lehman that the
4 assets in terms of the value you put on them should be valued
5 based on Lehman's marks at the time that you started this
6 process?

7 A. No. We started a process with valuing them as of Monday
8 morning when we -- Monday mid-afternoon when we started.

9 Q. And at that point, the Lehman marks were as of Friday
10 night, correct?

11 A. That's correct.

12 Q. And the markets had dramatically moved from Friday until
13 Monday, correct?

14 A. That is correct.

15 Q. And it was your view that it would be inappropriate to try
16 to use the marks on Lehman's books as an indication of the
17 value of the assets, correct?

18 A. It was my view that anyone looking at those assets would
19 not have used Friday night's marks. They would have used, at
20 that point in time, in the new week's marks.

21 Q. And you believed that the Friday mark didn't reflect any
22 relevance didn't reflect any relevance to what had happened in
23 the market or to an actual transaction, correct, sir?

24 A. Yes, that's correct.

25 Q. Now, the process that you started was what you described

1 as a bottoms-up process, correct?

2 A. Yes, I did.

3 Q. And what was this bottoms-up process of trying to value
4 Lehman's assets?

5 A. We took a snapshot of what the portfolio, if you will, of
6 assets or the inventory was starting on Monday. We broke down
7 those assets in terms of the specific asset classes. We broke
8 out into individual teams working through -- Barclays and
9 Lehman working through those assets. And then we went through
10 a process of trying to identify the significant concentrated
11 positions because we didn't have time to value every single
12 line item. But we went through the concentrated positions that
13 led to the bulk of the assets being considered in that process.

14 Q. And you would have established what you believed to be a
15 fair market value for the individual assets that were the most
16 important assets in the portfolio, correct?

17 A. Most important in terms of the concentration of their size
18 as a percentage of the total, correct.

19 Q. Most important, in terms of how much value they
20 represented, is that correct?

21 A. That's correct.

22 Q. And for those, you would have determined a fair market
23 value on an individual asset-by-asset basis, correct?

24 A. That's correct.

25 Q. How many people were involved in this process?

1 A. It's -- I wasn't in the room for all of the individual
2 breakout team meetings but my guess would be over twenty.

3 Q. And is that over twenty from Lehman or about ten from
4 Lehman, about ten from Barclays.

5 A. I'm sorry, yes. About ten from each.

6 Q. About ten from each of the two companies?

7 A. Yes.

8 Q. And among these people that were actually doing the
9 valuing of the assets, was there a lot of back and forth as to
10 what price was the right price?

11 A. Yes, there was.

12 Q. Was there a lot of disagreement?

13 A. Yes, there was.

14 Q. And, particularly under the circumstances of that week,
15 would you have expected that there would be a lot of
16 disagreement as to what the right price was for assets?

17 A. Yes, I would have.

18 Q. Now there came a time when you and the teams that were
19 valuing these assets reached at least a tentative conclusion as
20 to valuation, correct?

21 A. That's correct.

22 Q. And that was approximately 1 p.m. on Tuesday, September
23 16th, correct?

24 A. That's about correct, yes.

25 Q. And the reason that you continued to work on valuation up

1 until 1 p.m. was because the market price was changing even
2 during Tuesday, correct?

3 A. Absolutely, yes.

4 Q. And changing in significant ways, correct?

5 A. Yes, it was.

6 Q. And the market had changed dramatically overnight just
7 from September 15th to September 16th, correct?

8 A. Yes, it had.

9 Q. After 1 p.m. on September 16th, the process didn't stop,
10 correct?

11 A. No, it did not.

12 Q. And indeed, this process of valuation was an ongoing
13 effort throughout the week, correct?

14 A. Yes. I would agree.

15 Q. And that was because as the week continued, the markets
16 continued to move in very significant ways, correct?

17 A. That's correct.

18 Q. Now, was there a free flow of information exchanged by all
19 of the interested parties in full view of the attorneys from
20 Weil Gotshal and Simpson Thacher and the financial advisors
21 from Lazard with respect to this process?

22 A. Yes, there was.

23 MR. GAFFEY: Objection, Your Honor. I don't think the
24 witness is competent to testify about anything other than his
25 own activities, not a free flow amongst other people.

1 THE COURT: Well, I think what he's in a position to
2 testify to is what he observed. So, to the extent that he was
3 in meetings attended by these individuals and these subjects
4 were discussed openly, he's certainly in a position to testify
5 as to that. And if Mr. Boies will accept that modification of
6 the question, I think the witness can answer it as modified.

7 MR. BOIES: Yes.

8 A. Yes. I observed a very open process with all the advisors
9 and attorneys from both sides.

10 Q. And there wasn't any effort to keep any of this valuation
11 process secret from anyone, was there?

12 A. No, there was --

13 MR. GAFFEY: Unless modified in the same way, Your
14 Honor, same objection.

15 THE COURT: All right. Let's see if we can pick up
16 the same judicial gloss on the question and then allow it to be
17 answered.

18 Q. Insofar as you were aware as the president of Lehman
19 Brothers and as a lead negotiator in this process, by your
20 observation, was there any effort to keep anything secret or
21 private about this valuation process or to keep anybody from
22 knowing anything about what was going on there?

23 A. No, there was not.

24 Q. Was there any effort, according to what you observed and
25 understood, to understate any of the assets?

1 A. No, there was not.

2 Q. Now, you have testified that you believe that what you
3 were trying to do was to get the assets and liabilities that
4 Barclays was going to acquire and assume in some kind of rough
5 balance. Do you recall that generally?

6 A. I testified we were trying to get to a place where we get
7 the best value for the Lehman assets. In the end, it roughly
8 ended up as an equivalent as it was structured for total value
9 of the deal.

10 Q. Yes. That's an important distinction and I want to follow
11 up on it. You were representing Lehman and you were trying to
12 get the best deal for Lehman, correct?

13 A. That's correct.

14 Q. And there were people representing Barclays that were
15 trying to get the best deal for Barclays, correct?

16 A. That's correct.

17 Q. And when you talk about there being a rough balance,
18 you're talking about that's the way it ended up, correct?

19 A. That's correct.

20 Q. You're not saying that there was an representation or
21 warranty that there was going to be a rough balance, correct?

22 A. There was not.

23 Q. Okay. Now, when you talked about this deal ending up to
24 be a rough balance, am I correct that you're talking about a
25 rough balance between the assets that were valued and the

1 liabilities that were valued?

2 A. Yes.

3 Q. Now, Barclays was acquiring certain assets that were not
4 value, correct?

5 A. Yes.

6 Q. For example, the name, customer lists, things like that.
7 There was a long list of assets that Barclays was acquiring
8 that nobody attempted to value, correct?

9 A. Yes.

10 Q. And those asset values were not included in any
11 calculation of rough balance because they were never valued,
12 correct?

13 A. That's correct.

14 Q. So if Barclays made a gain based on the assets that had
15 not been part of your valuation process, that would not be in
16 any way inconsistent with what you were attempting to achieve,
17 correct?

18 A. Correct.

19 Q. Now, you testified about a difference of approximately you
20 thought about five billion dollars between the numbers that you
21 came up with in your valuation process and the Friday night
22 Lehman marks. Do you recall that?

23 A. Yes, I do.

24 Q. Now, you didn't personally participate in comparing the
25 valuation numbers with the numbers from the Friday marks,

1 correct?

2 A. That's correct.

3 Q. And if you were to do that, what you would do is you would
4 go to those Friday marks themselves, correct?

5 A. Yes, you would.

6 Q. And those Friday marks are in a system called the GFS
7 system, correct?

8 A. To the best of my understanding, yes.

9 Q. And you could go to the GFS system, find out what those
10 marks were and compare it to the valuation number that you came
11 up with and that would give you the best evidence of what the
12 difference, if any, was, correct?

13 MR. GAFFEY: Objection. Witness is incompetent to
14 determine what's the best evidence, Your Honor.

15 THE COURT: Well, I didn't think we were going to get
16 into the best evidence rule as quickly.

17 MR. BOIES: I meant in a colloquial sense.

18 THE COURT: Maybe we can restate the question so that
19 we stay away from best evidence. Maybe competent evidence,
20 maybe credible evidence --

21 MR. BOIES: Yes.

22 THE COURT: -- maybe some evidence but not the best
23 evidence.

24 MR. BOIES: Okay. I apologize, Your Honor. That was
25 a -- awkward choice of words for an examination of a fact

1 witness.

2 Q. Mr. McDade, as a business person, would you consider the
3 best way and the most accurate way to figure out the extent to
4 which, if any, the valuation process came up with a number that
5 was different than the Friday marks would be to compare the
6 valuation process number with the Friday marks from the GFS
7 system.

8 MR. GAFFEY: Your Honor, I still think it's
9 objectionable opinion evidence.

10 THE COURT: Well, I'd sustain the objection in that
11 the witness is being asked to opine as to the relative benefit
12 of comparing marks with a particular benchmark standard. And I
13 think there's probably an easier way just to get at it. And if
14 we can stay away from putting qualitative references into the
15 system that was in effect on Friday for comparison purposes and
16 just say whether or not a businessperson would compare today's
17 marks with last Friday's marks and as a result find out the
18 difference, that might be a way to get at it. But I'm not
19 suggesting the question.

20 MR. BOIES: Nevertheless, let me adopt the Court's
21 formulation.

22 Q. Mr. McDade, if you, as the president of Lehman Brothers,
23 wanted to know what the difference was between the valuation
24 number estimating the value of Lehman assets and the Friday
25 night Lehman marks estimating the value of those same assets,

1 am I correct that you would compare the valuation number with
2 the results from the GFS system?

3 A. Yes.

4 Q. Okay. Now, am I correct that you don't recall who it was
5 that mentioned the approximate five billion dollar difference,
6 do you?

7 A. There were a lot of specific meetings over the course of
8 Monday and Tuesday as that process of valuation was working
9 through the different teams. So I don't recall a specific
10 conversation with respect to it. But I recall Mr. Kelly's
11 being part of a process to try to mark a moment early on
12 Tuesday.

13 Q. Okay. Now, this five billion dollar differential or
14 approximate five billion dollar differential, you would not
15 describe as a discount, correct?

16 A. I would not describe it as a discount. That's correct.

17 Q. You would describe it as a change in the valuation of the
18 assets, correct?

19 A. That's correct.

20 Q. Now you never spoke with anyone at Barclays where this
21 five billion dollar differential was mentioned, correct?

22 A. No, I did not.

23 Q. And you never had any discussion with anyone at Barclays
24 about the concept of a discount, correct?

25 A. No, I did not.

1 Q. I'd like to now turn to a document that you were given
2 yesterday by Lehman's counsel, Movants' Exhibit 2. And that's
3 in the book that you have up there, I think. Do you have that
4 document in front of you?

5 A. Yes, I do.

6 Q. And this is a document that has a September 16th, 2008
7 date on it both in handwriting and in printing, correct?

8 A. Yes, it does.

9 Q. And the time printed is 11:18 a.m.?

10 A. Yes. I see that.

11 Q. And who prepared this document as you understand it?

12 A. I don't have a specific knowledge of who actually prepared
13 the document.

14 Q. When did you first see this document?

15 A. I saw this document as it started to be used as a guidance
16 document at some point in the process between Monday late and
17 Tuesday.

18 Q. And am I correct that there were different versions of
19 this document or schedule that had different numbers and totals
20 on them as the negotiation process and the market changes
21 continued?

22 A. Yes. That would be my recollection.

23 Q. And there would have been versions of this schedule both
24 before and after September 16th at 11:18 a.m., is that correct?

25 A. That's correct.

1 Q. Now, if you look at the numbers here for the assets on
2 Movants' Exhibit 2 --

3 A. Yes.

4 Q. -- you would consider, as of the time this was prepared,
5 to be the book value of those assets as far as Lehman was
6 concerned, correct?

7 A. No. I've described -- this would -- I would consider to
8 be the book value as of the process that we went through with
9 the different teams.

10 Q. Can you explain what you mean by that?

11 A. This would have been the market value after the
12 discussions with the Barclays and Lehman team.

13 Q. And when you say it's a book value in terms of the
14 process, what do you mean by that?

15 MR. GAFFEY: Objection, Your Honor. I believe the
16 witness said market value.

17 THE COURT: Well, what does the record say the witness
18 said?

19 MR. MAGUIRE: Your Honor, the question reads at page
20 30 of the transcript starting at line 20:

21 "Q. Can you explain what you mean by that?

22 "A. That would have been the market value after the
23 discussions with the Barclays and Lehman team.

24 "Q. And when you say it's a book value in terms of that
25 process, what do you mean by that?"

1 MR. BOIES: You need to start three lines above, Your
2 Honor, where he says -- if you could scroll it down. Scroll it
3 down some -- yeah. He started after the witness said
4 something, Your Honor.

5 MR. MAGUIRE: Yeah. The previous --

6 MR. BOIES: The previous thing that the witness
7 said --

8 THE COURT: Let's stop for a moment so that we can all
9 read the text in full context.

10 MR. BOIES: At line -- if you start at line 13, which
11 is the witness' answer, he says -- the question precedes it:
12 "Q. -- you would consider, as of the time this was prepared,
13 to be the book value of assets as far as Lehman was concerned,
14 correct?

15 "A. No. I've described -- this would -- I would consider to
16 be the book value as of the process that we went through with
17 the different teams."

18 And now my question is:

19 "Q When you said that you would consider this to be the book
20 value as of the process, what did you mean?"

21 THE COURT: Based upon that, do you continue with the
22 objection, Mr. Maguire?

23 MR. MAGUIRE: I think subject to the clarification
24 that the witness has explained market value of the prior
25 answer, I withdraw my objection.

1 THE COURT: Fine.

2 Q. Do you have the question, sir?

3 THE COURT: We have just demonstrated the value of
4 LiveNote.

5 A. Could you repeat it? I apologize.

6 Q. Sure. Sure. You considered the asset values on Movants'
7 trial exhibit to represent the book value of the assets in
8 terms of the valuation process that you were undertaking,
9 correct?

10 A. That's correct.

11 Q. Can you explain what you meant by that?

12 A. What I meant is that this would reflect the prices after
13 discussions and negotiations between the Barclays risk team and
14 the Lehman risk team.

15 Q. And these prices were the prices that you believed were
16 the market value at that time, correct?

17 A. That's correct.

18 Q. And you believed that the book value of assets should be
19 the market value of those assets, correct?

20 A. The book value at any given night would equal the market
21 value -- the fair value on any given night in a normal process,
22 yes.

23 Q. Thank you.

24 (Pause)

25 Q. Now I think you testified that Lehman had not marked its

1 books on September 15th, correct?

2 A. To the best of my understanding, yes.

3 Q. And indeed, you have testified that it would have been in
4 your view impossible to mark on Monday the 15th, correct?

5 A. Given all the issues that we had with our personnel, yes.

6 Q. And I think you've already answered this but I want the
7 record to be absolutely clear. You believe that the asset
8 values on Exhibit 19 were the fair market value of those assets
9 at the time that this exhibit was prepared. And Exhibit 19 is
10 the deposition number for Movants' Exhibit 12, correct?

11 A. Yes, I do.

12 Q. And you believed that the asset values that are on this
13 exhibit, Movants' Exhibit 12, were the fair market value of
14 those assets at the time that this exhibit was prepared,
15 correct?

16 A. Yes, I do.

17 MR. MAGUIRE: Just so the record is clear, Your
18 Honor --

19 THE COURT: It's Movants' Exhibit 2.

20 MR. MAGUIRE: Thank you.

21 MR. BOIES: I apologize.

22 Q. Movants' Exhibit 2, correct?

23 A. Yes. Yes.

24 Q. Let me just be sure I got the words right. You believe
25 that the asset values on Movants' Trial Exhibit 2 represent the

1 fair market value of those assets at the time Movants' Exhibit
2 was prepared, correct?

3 A. Yes.

4 Q. Thank you. You were the president of Lehman Brothers at
5 the time and there were other senior people from Lehman
6 Brothers that were involved in the process of valuation that
7 you've described, correct?

8 A. Yes, that's correct.

9 Q. And you testified yesterday about how you had made sure
10 that there were no employment discussions with you because you
11 wanted to preserve your independence. Do you recall that?

12 A. Yes, I do.

13 Q. Now, you were aware that there were a number of other
14 Lehman personnel that were involved in this process that did
15 have either employment discussions or employment agreements
16 with -- or potential employment agreements with Barclays,
17 correct?

18 A. Yes, I was.

19 Q. Did you believe that that somehow compromised their
20 ability to represent Lehman in these circumstances?

21 A. No, I did not.

22 MR. GAFFEY: Objection, Your Honor. Opinion.

23 THE COURT: It's true. It's a belief as to
24 compromised ability. But I think that's the sort of lay
25 opinion that people engage in all the time. So he's not really

1 being asked as an expert. He's being asked in his capacity as
2 a senior officer of Lehman at the time his belief. I can weigh
3 it for whatever probative value it has which may be zero. He
4 can answer the question.

5 Q. I think you -- did you answer the question?

6 A. I think I did.

7 Q. And just for the record, what was the answer?

8 A. If you could --

9 Q. I'll put the question again.

10 MR. GAFFEY: Your Honor, I can stipulate the answer
11 was "No, I did not."

12 MR. BOIES: Okay.

13 MR. GAFFEY: The beauty of LiveNote again, Your Honor.

14 Q. And why -- why was that?

15 A. I had worked with all of the individuals that potentially
16 were part of that conflicted group for a long period of time.
17 In fact, in most cases, well into decade plus -- and I knew
18 them of great integrity. And I think I described in my
19 deposition, I knew they bled Lehman green.

20 Q. Now, you are now aware that there came a time that the
21 Barclays transaction was considered by the Lehman board,
22 correct?

23 A. Yes.

24 Q. You were not personally involved in any of the board
25 meetings relating to the Barclays transaction, correct?

1 A. I don't have a recollection of that.

2 Q. You reviewed the APA prior to the time it was signed to
3 make sure that it accurately reflected the final agreement,
4 correct?

5 A. Yes, I did.

6 Q. After the APA was signed, is it fair to say that the
7 valuation process started all over again at the end of that
8 week?

9 A. The valuation process continued through the week, yes.

10 Q. And at some point it became clear that the securities that
11 could be delivered to Barclays had decreased significantly
12 between Tuesday when the APA was signed and Thursday.

13 A. The composition of the assets had changed dramatically,
14 yes.

15 Q. And that was, in part, because of market decline, correct?

16 A. In part, yes.

17 Q. And it was, in part, because there was some collateral
18 stuck at J.P. Morgan?

19 A. Correct.

20 Q. And it was, in part, because Lehman's positions had been
21 wiped out or closed out at a number of places, correct?

22 A. That's correct.

23 Q. Can you describe some examples of where Lehman positions
24 were wiped out or closed out during the course of the week of
25 September 15th?

1 A. I would use the example of the call that we got late in
2 the week from the CME with respect to positions that we had had
3 on that exchange.

4 Q. And what happened there?

5 A. Despite our asking for it not to happen, our positions
6 were put out into an open auction process. And ultimately, we
7 were taken out of those positions and the margin associated
8 with those positions.

9 Q. Let me be sure I understand what you're saying there. At
10 the CME, you had certain positions and you had certain margin
11 on deposit as collateral for those positions, correct?

12 A. That's correct.

13 Q. And when your positions were closed out by the CME, you
14 lost your margin or collateral, correct?

15 A. Correct.

16 Q. And how much was involved there approximately, if you
17 recall?

18 A. I don't have the specific recollection but it was in
19 excess of a billion dollars to the best of my recollection.

20 Q. Now, you were asked some questions about the repo
21 financing. Do you recall that?

22 A. Yes.

23 Q. And just for context, that was financing that was
24 originally provided by the Fed to Lehman Brothers, is that
25 correct?

1 A. Yes, it is.

2 Q. And then on the week of September 15th, the Fed asked
3 Barclays to substitute Barclays for the Fed, correct?

4 A. Yes, it did.

5 Q. And so it was necessary, as part of this process, for
6 there to be the same kind of valuation of the assets included
7 in the repo as had been done previously in the week, correct?

8 MR. GAFFEY: Objection.

9 THE COURT: What's the basis for the objection?

10 MR. GAFFEY: Foundation, Your Honor. No personal
11 knowledge of how the repo valuations were done.

12 THE COURT: All right. That objection is sustained.
13 We can ask a few questions to get to the same point.

14 Q. Do you have any understanding one way or the other as to
15 whether the process for valuing the repo assets was the same
16 process that you have described that went on earlier in the
17 week in terms of trying to value Lehman's assets?

18 A. I have an understanding that the process would have been
19 similar, yes, and many of the assets would have been the same
20 assets.

21 Q. Let me follow up on that. What do you mean by many of the
22 assets would have been the same assets?

23 A. The inventory from Schedule -- the 19 was -- and the
24 marked process that we went through, that was originally
25 financed through the Fed. But it's the same inventory as a

1 bulk of the inventory that moved that would have been part of
2 the now Barclays repo.

3 Q. Let me be sure the record is clear. In the initial
4 valuation process, you would have been valuing the assets that
5 were subject to the Fed repo because they were Lehman assets
6 even though they were used as collateral for the Fed repo, is
7 that correct?

8 A. Correct. That's correct.

9 Q. Let me turn to the subject of 15c3 which I think you
10 testified was something that you had never heard of before this
11 process.

12 A. That's correct.

13 Q. And it's something that I never heard of before this
14 process. This was something that was identified to you either
15 Thursday or Friday, correct?

16 A. It wasn't Friday. It was before -- it was before Friday -
17 -

18 Q. Before Friday.

19 A. -- because we had identified it as a possible value in
20 terms of -- asset with potential value in terms of the
21 transaction.

22 Q. And the purpose of identifying the 15c3 assets was to
23 provide Barclays with additional assets, is that correct?

24 A. That would be correct.

25 Q. And you're also trying to provide Barclays with additional

1 assets through what you described as unencumbered assets, do
2 you recall that/

3 A. Yes.

4 Q. And were those unencumbered assets, at least in part, what
5 have been referred to as clearance box assets?

6 A. Yes.

7 Q. And would you describe for the record what clearance box
8 assets are?

9 A. Simply an asset that has not been pledged in any repo. So
10 it's an inventory that would have been unencumbered from any
11 borrowing against it.

12 Q. And there would be clearance box assets, for example, at
13 the DTCC, correct?

14 A. They would be identified at the DTC, yes, but through our
15 clearing -- clearing bank through ultimately DTC, yes.

16 Q. Now, you testified about some discussions between Barclays
17 and the DTCC from which Lehman people were excluded. Do you
18 recall that?

19 A. Yes.

20 Q. Did you feel at the time that there was anything improper
21 or inappropriate about your being excluded from those
22 discussions?

23 A. Frustrated, yes. Improper? I had no reason to believe it
24 would be improper.

25 Q. As you would have liked to have been there but you

1 understood that they were going to try to exclude you, correct?

2 A. Yes.

3 Q. The -- did you get reports from anyone as to what had
4 happened in those discussions?

5 A. Yes, we did.

6 Q. Who did you get those reports from?

7 A. We got those reports generally from gathering back
8 together as the larger group of the Barclays/Lehman team
9 including advisors.

10 Q. And at that time, somebody from Barclays would give you a
11 report as to what had happened, is that correct?

12 A. Yes. I don't have a specific name in terms of a
13 recollection but yes, generally.

14 Q. Did you ever come to believe that anything that had gone
15 on between the DTCC and Barclays or any agreement between them
16 had changed in any way the terms of the APA?

17 A. The original terms of the APA?

18 Q. Yes.

19 A. Yes.

20 Q. What?

21 A. Yes.

22 Q. In what way?

23 A. A requirement of a deposit of 250 million dollars being
24 used to satisfy the DTC's concerns.

25 Q. Other than the deposit of 250 million dollars, did you

1 ever come to believe that anything between the DTCC and
2 Barclays, any agreement or discussion, changed in any way the
3 deal that Barclays was doing with Lehman?

4 A. No.

5 Q. Now the DTCC had essentially told Lehman that they were
6 going to shut down your ability not only to transact business
7 going forward but to shut down hundreds of thousands of
8 settlements that were already in process, correct?

9 A. That's correct.

10 Q. And if that had happened, that would have had a
11 devastating effect on Lehman and its value, correct?

12 A. Yes, I believe so.

13 Q. Let me turn to the subject of exchange traded derivatives
14 and the margin and collateral associated with that. First, you
15 don't recall one way or the other what the terms were of any
16 deal with respect to exchange traded derivatives or their
17 collateral, correct?

18 A. Could you repeat the question?

19 Q. Yes. You don't personally -- you were not personally
20 involved in and you do not personally recall one way or the
21 other what the deal was with respect to exchange traded
22 derivatives and their collateral.

23 A. To the specifics, yes, that's correct.

24 Q. And that's because you were not personally involved in
25 those negotiations, correct?

1 A. That's correct.

2 Q. Who was involved in the negotiations with respect to
3 exchange traded derivatives and their collateral?

4 A. I don't have a specific answer or knowledge of that.

5 Q. Okay. You did recognize at the time that the margin or
6 collateral that Lehman had with respect to exchange traded
7 derivatives, including at the OCC, could be wiped out if those
8 positions were closed, correct?

9 A. It had happened during the week already as an example with
10 the CME so yes.

11 Q. And the OCC was, in fact, threatening to close out
12 Lehman's position, correct, during that week?

13 A. I have no knowledge of that.

14 Q. One way or the other?

15 A. No idea.

16 Q. And because of what had happened at the CME, you had no
17 confidence that Lehman would ever realize any value from the
18 margin or collateral that it had at OCC, correct?

19 A. No. I wouldn't make that a correct statement, no.

20 Q. Let me ask you to look at page 275 of your deposition and,
21 particularly, at line 3. And perhaps, for context, let me go
22 to page 274, line 20:

23 "Q. And those are positions and derivatives that LBI had?

24 "A. Yes, exchange traded.

25 "Q. The exchange traded, do those include derivatives that

1 were traded on the Options Clearing Corporation or OCC?

2 "A. Yes.

3 "Q. Did you understand that in addition to the long positions
4 and the short positions that Lehman had OCC, it also had
5 additional cash and assets that were deposited as margin and
6 also clearing funds deposited at the OCC?

7 "A. Yes, I did. But keep in mind the context, that we had had
8 assets like that, for example, at the CME and they lost those
9 assets over the course of the week. So we had no confidence
10 that those were potentially our assets given what had been
11 transpiring."

12 Do you see that?

13 A. Yes.

14 Q. And was that accurate testimony at the time you gave it?

15 A. That was accurate testimony, sir. I wouldn't have used
16 those assets in a transaction of -- because I wasn't confident
17 that we had those assets to give.

18 Q. Right. So you didn't have any confidence you had those
19 assets to give at that time?

20 A. Correct.

21 Q. And you didn't have any confidence, as you say here, "that
22 those were potentially our assets given what had been
23 transpiring", correct?

24 A. Correct.

25 Q. Let me turn to the subject of compensation and the

1 exposure to compensation that Barclays was taking over. First,
2 you were present when a proffer was given to the Court
3 concerning what your testimony would have been with respect to
4 this subject matter, correct?

5 A. Yes, I was.

6 Q. And the Court was told that you would have testified that
7 the exposure for employees -- Barclays' exposure for employees
8 that accepted offers of employment was estimated to be an
9 exposure of approximately two billion dollars, correct?

10 A. That's correct.

11 Q. And you recognized that that was Barclays' exposure. It
12 was not necessarily what Barclays would actually end up paying,
13 correct?

14 A. Yes.

15 Q. And I'd like to go through some of the components of that
16 exposure. It included bonuses that Barclays was obligated to
17 pay employees, correct?

18 A. It included bonuses that Barclays would be paying
19 employees, yes.

20 Q. That is, it included an exposure -- I said obligated and I
21 shouldn't have. And you corrected me and that's correct -- and
22 I appreciate that. This included bonuses that Barclays was
23 exposed to possibly paying, correct?

24 A. And the bonuses that Barclays was exposed to possibly
25 paying employees were greater than the bonuses that were

1 accrued on Lehman's books, correct?

2 A. That's correct.

3 Q. And that was true for a number of reasons, correct?

4 A. That's correct.

5 Q. One of the reasons is that the bonuses that had been
6 accrued had not been annualized, correct?

7 A. They represented three-quarters of the year, yes.

8 Q. Another reason is that Lehman paid bonuses both partly in
9 stock and partly in cash, correct?

10 A. That's correct.

11 Q. And Lehman gave a higher proportion of its bonus in stock
12 than other Wall Street firms, correct?

13 A. Yes, we did.

14 Q. And Lehman only accrued on its books that portion of the
15 bonus that represented the cash portion, correct?

16 A. Correct.

17 Q. Now, in addition, Barclays was exposed to possibly paying
18 severances for people that were terminated, correct?

19 A. Barclays was definitively exposed to severance for those
20 that wouldn't be hired after the ninety-day period.

21 Q. And the amount of severance would depend on how many
22 people were actually terminated, correct?

23 A. How many people and that constituent of who those people
24 were.

25 Q. That is, how much severance they were due.

1 A. Correct.

2 Q. In addition, Barclays was required to hire all of Lehman's
3 employees at the time of the closing, correct?

4 A. Yes, that's correct.

5 Q. And it was required to keep those people employed, I
6 think, for -- was it ninety days?

7 A. Ninety days.

8 Q. So Barclays was also exposed to paying the salaries of
9 people that it didn't want for that ninety-day period, correct?

10 A. Yes. I agree.

11 Q. Did you make any effort to determine how much Barclays was
12 exposed to pay for employees that it was taking on in addition
13 to what was on Lehman's books?

14 A. Did I personally?

15 Q. Yes.

16 A. I personally had reviewed the process that had taken place
17 between mostly the human resources teams on both sides. But I
18 personally did not go through the specific information or the
19 specific data.

20 Q. Based on your review of what the two sides had done, did
21 you think that the estimated exposure that they had come up
22 with was a reasonable one?

23 A. Yes. I thought it was fair.

24 Q. Okay. Let me turn next to something that has been
25 referred to sometimes as cure payments.

1 A. Yes.

2 Q. And you're familiar with that term, are you not?

3 A. Yes, I am.

4 Q. And the fact that Barclays had certain potential cure
5 payments to make was one of the things that was included in the
6 consideration of the deal that you were involved in, correct?

7 A. Yes, it was.

8 Q. Now, Lehman had on its books certain estimates of cure
9 payments, correct?

10 A. Yes.

11 Q. Now, the cure payments that were on Lehman's books only
12 included cure payments that were already overdue, correct?

13 A. I'm not aware in that specific detail.

14 Q. Okay. That is, you don't know whether the numbers on
15 Lehman's books included cure payments for what the estimate was
16 that was going to be owed or only what was already past due?

17 A. Yes. I have no knowledge of that.

18 Q. Okay. Did some of the vendors that provided services and
19 that were owed money provide invoices to Lehman's affiliates
20 rather than to LBI directly?

21 A. I have no knowledge of that.

22 Q. Do you know whether the cure estimates on Lehman's books
23 included amounts owed to vendors who performed services for
24 LBI's business but who had contracts with Lehman affiliates?

25 A. I have no knowledge of that.

1 Q. Do you know whether the cure payment accrual numbers on
2 Lehman's books included amounts owed for services that had
3 already been performed but for which the vendor had not sent an
4 invoice?

5 A. I have no knowledge of that.

6 Q. Do you know whether the accrual payments on Lehman's books
7 included amounts for services to be performed during the sixty-
8 day period following closing which Barclays was required to pay
9 under Section 2.5 of the APA.

10 A. I have no specific knowledge, again, of that.

11 Q. Did you participate in coming up with the cure estimate
12 that was included in some of the schedules relating to this
13 transaction with Barclays?

14 A. I did not participate in a specific way, no.

15 Q. Who was responsible for that?

16 A. That would have been Martin Kelly, the controller.

17 Q. Did you recognize that whatever estimate Mr. Kelly came up
18 with represented a ceiling or maximum exposure.

19 A. It was described as a potential exposure.

20 Q. A potential exposure. And you recognized that that
21 exposure might or might not actually result in payments by
22 Barclays, correct?

23 A. Yes. Yes, I did.

24 Q. And you understood that Barclays had sixty days under the
25 agreement to determine which contracts to assume, correct?

1 A. Yes, I did.

2 Q. And which contracts Barclays assumed would determine what
3 its cure payments were, correct?

4 A. That's correct.

5 Q. And the process of determining what contracts Barclays was
6 going to assume was not going to start until after the closing,
7 correct?

8 A. It couldn't start until after the closing given all the
9 significant integration issues that had to take place.

10 Q. And you understood that Barclays had complete discretion
11 as to what contracts to accept and what contracts to reject,
12 correct?

13 A. Yes, I did.

14 MR. BOIES: Your Honor, may I have a moment? Or would
15 this be a convenient time for the --

16 THE COURT: You may have more than a moment if you'd
17 like a --

18 MR. BOIES: Thank you.

19 THE COURT: We're very close to our morning break.

20 MR. BOIES: Thank you, Your Honor.

21 THE COURT: Are you --

22 MR. BOIES: Could we take a break now?

23 THE COURT: Are you ready for a break? That's fine.
24 We'll take a break for fifteen minutes resuming at 11:05.

25 (Recess from 10:48 a.m. until 11:09 a.m.)

1 THE COURT: Be seated, please.

2 MR. BOIES: Thank you, Your Honor.

3 RESUME CROSS-EXAMINATION

4 BY MR. BOIES:

5 Q. Mr. McDade, do you still have Movants' Trial Exhibit
6 number 2 in front of you?

7 A. No.

8 Q. Would you turn to that? That's in the book that counsel
9 for the movants gave you. This is the 9/16/2008 11:18 a.m.
10 version of the schedule we were talking about. You have that/

11 A. Yes.

12 Q. Now, any one of these asset categories, and perhaps the
13 liabilities categories as well, could change significantly over
14 the course of a few days, correct, in terms of valuation?

15 A. Yes.

16 Q. And in some cases they did during that week, correct?

17 A. Yes.

18 Q. And if any one of these asset categories changed
19 significantly either by dropping out or by changing in value,
20 that would put it in balance unless there was another change, a
21 corresponding change, in the liabilities, correct?

22 A. You'll have to repeat that. Sorry.

23 Q. Sure. If you had a change in the assets either because
24 the value changed significantly, as you indicated was happening
25 day by day, or because one of these categories dropped out,

1 unless there was a corresponding change in the liabilities, the
2 deal would not be in balance, correct?

3 A. That's correct.

4 Q. And if such a change happened before closing, there would
5 be a possibility of making a corresponding adjustment in the
6 liabilities, correct?

7 A. Make -- you'll have to explain the "making a corresponding
8 adjustment".

9 Q. Sure. If there was a significant change in the valuation
10 of one of the asset categories or one of those asset categories
11 just dropped out, if it happened before closing there would be
12 at least the possibility that the deal could be adjusted by
13 changing the liabilities.

14 A. Yes.

15 Q. But once the closing happened, if such a change occurred,
16 there couldn't be any rebalancing, correct?

17 A. I agree.

18 Q. And you never had any conversations with anyone from
19 Barclays about the deal being a wash or any requirement that
20 assets and liabilities match or bounce, correct?

21 A. No, I did not.

22 Q. Let me ask you to look at --

23 MR. BOIES: Did we hand out our binder? Okay. We
24 have -- the "Witness Examination". We have a small binder for
25 you, too.

1 THE COURT: Thank you.

2 MR. GAFFEY: Your Honor, I'm going to need a binder.

3 UNIDENTIFIED SPEAKER: Yes, I'm aware.

4 THE COURT: This is the second time that has happened.

5 MR. GAFFEY: I'm not hurt yet.

6 MR. BOIES: Next time she'll give it to him first,
7 Your Honor. As she's going around the courtroom, she has to
8 start and end someplace. And if counsel wishes, she will start
9 with him next time.

10 MR. GAFFEY: Mr. Boies' ability to take a hint is
11 impressive, Your Honor.

12 BY MR. BOIES:

13 Q. Mr. McDade, would you turn to tab 7 of this document?

14 This is a document that has been marked as BCI Exhibit number
15 189-A and also here is Exhibit 189. They are both copies of
16 the same e-mail. 189-A is a slightly better copy. Do you
17 recall receiving this e-mail?

18 A. I don't recall, no.

19 Q. You know that you did receive it, though, correct?

20 A. Yes. I can see that at the top.

21 Q. And indeed, if you look at the next tab, which is Exhibit
22 190, you sent a reply message indicating that the Exhibit 189-A
23 e-mail had been read.

24 MR. GAFFEY: Objection, Your Honor.

25 Q. Is that correct?

1 MR. GAFFEY: Objection, Your Honor.

2 THE COURT: What's the objection?

3 MR. GAFFEY: Foundation. I'm not sure it's apparent
4 from the face of the document whether Mr. McDade sent it or
5 whether this is an automatic return receipt.

6 THE COURT: All right. But at least the witness is in
7 a position to know whether or how he interacted with this. So
8 I think the question's permissible.

9 A. I don't have a recollection of seeing the document. I
10 don't have a recollection of some evidence of creating this as
11 "was read".

12 Q. I'm sorry. Say that again.

13 A. I don't have a recollection of reading the document. So I
14 don't have an explanation for how the message was created in
15 terms of "was read".

16 Q. Even though you don't have any recollection of either
17 seeing the e-mail or sending the "Was read" e-mail that is
18 Exhibit 190, as you sit here now, you don't have any doubt that
19 you actually did get this e-mail, correct?

20 A. It's possible my assistant replied and potentially
21 printed. But I don't -- I don't know how to answer that
22 question specifically. It certainly looks like I read it from
23 this e-mail, yes.

24 Q. Let me direct your attention to Exhibit 189-A. On the
25 first page, do you see the heading "What is being acquired"?

1 A. Yes, I do.

2 Q. And this purports to be the highlights from a Barclays
3 conference call, correct?

4 A. Yes. It looks like that, yes.

5 Q. And this e-mail is being sent around on September 17th,
6 2008, a Wednesday, correct?

7 A. That's correct.

8 Q. And in addition to going to you, it goes to a number of
9 other people. And I'd like to try to get you to identify them
10 for the record.

11 A. Sure.

12 Q. The first person listed is you, correct?

13 A. That's correct.

14 Q. The second person listed is Gerald Donini. Do you see
15 that?

16 A. Yes.

17 Q. Do you know who he is?

18 A. Global head of the equity division.

19 Q. Of Lehman?

20 A. Of Lehman.

21 Q. The next person is Richard Cunningham. Do you know who he
22 is?

23 A. Yes. He ran U.S. sales for equities at Lehman.

24 Q. The next person is Joseph Cochran. Do you know who he is?

25 A. U.S. head of trading for Lehman -- equities.

1 Q. The next person is Ajay Nagpal.

2 A. Ajay Nagpal was the global head of sales for equity
3 division.

4 Q. And all of these are Lehman executives?

5 A. Yes, they are.

6 Q. The next person is Patrick Qualin (ph.). Do you know who
7 he is?

8 A. Yes. He was the equity senior employee.

9 Q. The next person is Stuart Lin (sic). Do you know that is?

10 A. Stuart Linde was the head of research in equity division.

11 Q. The next person is Ravi Mattu.

12 A. Ravi Mattu was the head of research for dead-end equity.

13 Q. The next person is William Meyers.

14 A. Chief operating officer for equity research at Lehman.

15 Q. The next person is Ann Gillin-Lefever.

16 A. Ann Gillin was the head of a desk analyst group in the
17 equity division.

18 Q. The next person is Stephen Gresdo.

19 A. Desk analyst, equities, Lehman.

20 Q. The next person, Eric Johnston.

21 A. Equity trading -- cash equity trading head, U.S., Lehman.

22 Q. The next person is James Everett.

23 A. Cash equity trader, Lehman.

24 Q. The next person is Ryan Abrahamson.

25 A. Trader, equities, Lehman.

1 Q. The next person is Eric Bertrand (ph.).
2 A. I apologize to him. I don't recall him.
3 Q. Okay. The next person, Alex Cramm (ph.).
4 A. Do not know.
5 Q. Steven Trong (ph.).
6 A. Do not know.
7 Q. Jason Goldberg.
8 A. Equity research, Lehman.
9 Q. Bruce Harting.
10 A. Equity research, Lehman.
11 Q. Jay Gelb.
12 A. Equity research, Lehman.
13 Q. Eric Berg.
14 A. Equity research, Lehman.
15 Q. Andrea Jou (ph.)
16 A. Equity research, Lehman.
17 Q. Richard Gross.
18 A. Equity research, Lehman.
19 Q. Robert Cornell.
20 A. Equity research, Lehman.
21 Q. Gary Chase.
22 A. Equity research, Lehman.
23 Q. Roger Freeman.
24 A. The deliverer, equity research.
25 Q. And Roger Freeman is the person who sent this, is that

1 correct?

2 A. Correct.

3 Q. And did Mr. Freeman have a title at Lehman?

4 A. Mr. Freeman was the U.S. equity research analyst for
5 financial institutions in the broker-dealer and exchange names.

6 Q. Now, on the first page, under "What is being acquired", it
7 says: "Trading assets of seventy-two billion and liabilities
8 of sixty-eight billion". Do you see that?

9 A. Yes, I do.

10 Q. And is that consistent with your understanding of the
11 state of the negotiations as of September 17th?

12 A. Yes.

13 Q. And the next page, under "Capital Requirements" near the
14 bottom of the page --

15 A. Yes. I see that.

16 Q. -- it says "This transaction, due to two billion dollars
17 in after-tax negative goodwill, is accretive to capital ratios
18 immediately. Do you see that?

19 A. Yes, I do.

20 Q. First, what is "negative goodwill"?

21 A. That would be some value created without a purchase price
22 for Barclays.

23 Q. And do you know what the basis of Barclays' negative
24 goodwill was?

25 A. No. I have no knowledge of how Barclays would have looked

1 at this from an accounting point of you.

2 Q. Is there anything inconsistent with Barclays having after-
3 tax negative goodwill immediately upon the closing of the
4 transaction with what you were intending to accomplish?

5 A. No.

6 MR. BOIES: Your Honor, I have no more questions.

7 THE COURT: All right. Is there any redirect?

8 MR. GAFFEY: Yes, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. GAFFEY:

11 Q. Good morning, Mr. McDade.

12 A. Good morning.

13 Q. Now, Mr. McDade, you were asked yesterday by Mr. Boies
14 whether at the time the transaction was presented to the Court,
15 based on everything you know now, do you believe that the
16 transaction was presented to the Court in a fair and balanced
17 way and you answered, "Yes, I do". Do you recall that?

18 A. Yes, I do.

19 Q. Can you -- and today, you've spent some time in your
20 testimony talking about a process where there were interactions
21 between Barclays traders and Lehman traders to arrive at a
22 market value for the assets to be transferred in the sale
23 transaction, is that right?

24 A. Yes.

25 Q. And it is not the normal method, is it, of coming to a

1 view of what the marks should be on a broker-dealer's books, to
2 do so by negotiations with a single purchaser, is it?

3 A. I would agree with that.

4 Q. You've never heard of that being done before, have you?

5 A. I can't say that I have, no.

6 Q. So that's not the method by which you arrive at mark-to-
7 market accounting on the books and records of a broker-dealer.
8 Is that right?

9 A. The normal course -- in the normal course.

10 Q. And do you have any recollection at any point in your
11 testimony at the sale hearing of telling the Court that the
12 method by which the book value of Lehman's assets was arrived,
13 was through this unusual method of negotiating with a single
14 purchaser?

15 A. In my proffer?

16 Q. Either in your proffer or at any point on cross-
17 examination, sir?

18 A. I believe in Mr. Ridings -- my recollection, in some
19 questions by Mr. Ridings, there was discussion around the
20 process of other potential -- of potential buyers, why not
21 there was a process of four other potential buyers in the
22 process. And it was explained through what Lehman had gone
23 through previously, in terms of trying to sell ourselves before
24 the whole bankruptcy process.

25 Q. I think we may be missing each other on the question, sir.

1 Do you recall at any point, any disclosure being made to the
2 Court that the method by which the values were arrived at for
3 the sale transaction were a negotiation between Lehman and
4 Barclays, as opposed to Lehman's normal method of arriving at
5 book value?

6 A. No, I do not.

7 Q. Do you recall a portion of your testimony at the sale
8 hearing where you described a line-by-line valuation that had
9 taken place up through that morning?

10 A. No.

11 MR. GAFFEY: Can I have a copy of 241 for the witness,
12 please?

13 UNIDENTIFIED ATTORNEY: 261.

14 MR. GAFFEY: 261. That would be even better. Your
15 Honor, may I approach?

16 THE COURT: Yes, you may.

17 THE WITNESS: Thank you.

18 THE COURT: Thank you.

19 Q. I've given you, Mr. McDade, Movants' Trial Exhibit 261,
20 which is the transcript of proceedings before the Court at the
21 sale hearing on the 19th of September. And I'd ask you, sir,
22 to take a look at page 109, and go down to line 19. And for
23 context, sir, I will tell you, this is not part of your
24 proffer, this is on cross-examination by a Mr. Qureshi. And
25 that's reflected at page 103 of the transcript.

1 Now, sir, in your testimony on cross-examination by Mr.
2 Qureshi, he asked you:

3 "Q. Does Lehman have any valuations -- internal valuations of
4 any of the assets that are being transferred to Barclays?

5 "A. Absolutely. There are many complex securities involved,
6 many different models that we use to evaluate those securities.

7 "Q. And so, sir, is it your testimony then, that a valuation
8 was conducted within Lehman of all of the assets that are being
9 transferred to Barclays? When was that conducted?"

10 And your answer, over on page 110 is, "Portfolio moved
11 during the week, but that was conducted all last evening, all
12 through and up to the arrangement -- the agreement today."

13 Now, was there a reason, sir, that when you answered that
14 question at the sale hearing, you did not mention that the
15 line-by-line valuation included participation by the purchaser,
16 by Barclays?

17 A. I don't recall a specific reason why.

18 Q. Do you recall, at any point, saying anything to reveal the
19 fact that Barclays was involved in the valuations that you
20 brought to the Court as evidence of fair value to the debtor,
21 here?

22 A. Barclays clearly was purchasing a set of assets as part of
23 the whole business acquisition.

24 Q. Well, let's go back to Mr. Qureshi's question. When you
25 were asked if there was a valuation performed, sir -- we've

1 agreed that the type of valuation we're talking about here was
2 a little unusual, where the purchaser and the seller sit down
3 and arrive at what you would view as a substitute for book
4 value, correct?

5 A. Correct.

6 Q. Was it sufficiently unusual that you might have seen fit
7 to mention it when you were asked at the sale hearing how the
8 valuation was done?

9 A. I don't think I would agree with that. It was very clear
10 it's a transaction between Barclays and Lehman and an agreed-
11 upon negotiation in terms of the price.

12 Q. And I think we established yesterday by looking at the
13 asset purchase agreement together, sir, that the description of
14 the Long Position was in terms of Lehman's book value. Do you
15 recall that?

16 A. I do recall that.

17 Q. And we've agreed, have we not, that book value is not
18 achieved by negotiating with a purchaser, it's achieved by the
19 broker-dealer making access to models and outside data,
20 etcetera. Is that right?

21 A. In a normal course of business all inputs, in terms of all
22 trades that happen in the marketplace, plus all models that are
23 used, are part of that process. We still used that in the
24 process of Lehman going through this process with Barclays.

25 Q. And in all your time at Lehman, sir, can you identify any

1 other incident where the books of Lehman -- the book value that
2 Lehman applied to its property, to its assets, was determined
3 by means of discussions and a process with a single purchaser?

4 A. Well, every transaction that would have taken place in my
5 twenty-five years, ultimately would have been reflected in book
6 value for every trade that happened, that was consummated.

7 Q. The question, sir, was whether you can recall a single
8 episode where book value for Lehman Brothers was determined in
9 a process in which Lehman participated with one single
10 purchaser?

11 A. I don't recall a specific example of that, no.

12 Q. This is the only specific example you can give, the one
13 you've described today. Is that right?

14 A. No, I wouldn't -- I wouldn't describe it that way. Every
15 time we did a transaction, and we did many bulk transactions
16 over the course of time, that would have reflected on -- any of
17 those actions would have been reflected on the books of Lehman.

18 Q. Well, when you reflect -- when you make a mark-to-market
19 on the books of Lehman, isn't it a fact that you don't look at
20 the entire bulk of the securities, you look at predictably
21 salable pieces of that asset class. Is that right?

22 A. That's fair, yes.

23 Q. A smaller -- a subset of the entire bulk of the
24 securities, correct?

25 A. That's correct.

1 Q. And you've talked today about Lehman's goal being to move
2 all the assets in the transaction, correct?

3 A. That's correct.

4 Q. And the process you've described today is the purchase of
5 that entire bulk, of all of those assets, correct?

6 A. Yes, correct.

7 Q. So that's not the same thing as taking account of what
8 purchases there might be across the market. That's looking at
9 what one buyer will pay for that entire class of assets. Is
10 that right?

11 A. That's correct.

12 Q. And in your experience, you've never heard book value
13 determined by that process, what one buyer would pay for the
14 entire class of assets. Is that correct?

15 A. My specific experience, no.

16 Q. All of your experience, sir?

17 A. Yes.

18 Q. Now, the valuation process that you described when you
19 answered Mr. Boies' questions, you were not, yourself,
20 personally involved in that, correct?

21 A. That's correct.

22 Q. You had delegated that. Is that right?

23 A. That's correct.

24 Q. So you don't know what the -- you know there was back-and-
25 forth, but you don't know what the back-and-forth was as

1 between the various traders talking about the various asset
2 classes, correct?

3 A. That's correct.

4 Q. You don't know as to any of the asset classes that were
5 under that discussion, how any particular price -- how any
6 particular value came into being. Is that correct?

7 A. That's correct -- that's correct.

8 MR. GAFFEY: Could we have Exhibit 2 up on the screen,
9 please?

10 Q. Exhibit 2 in your book, sir, it's the financial schedule.
11 Just take a look at that. So by way of example, sir, the forty
12 billion dollar item annotated against the governments on the
13 asset side, you don't know where that forty billion dollars
14 came from, correct?

15 A. That's correct.

16 Q. And you would say the same thing with respect to
17 commercial paper, mortgages, debt, equity, derivatives, and
18 cash --

19 A. Yes, I would.

20 Q. -- apart from cash?

21 A. Yes, I would.

22 Q. And with respect to the liabilities for cure and comp, and
23 you did not personally participate in estimating or calculating
24 those numbers. Is that correct?

25 A. I did not personally participate in cure. I had a few

1 brief conversations with individuals around compensation, but
2 not any significant discussions.

3 Q. And in the conversations you had around the comp issue,
4 you learned or determined that the comp number of two billion
5 dollars was an agreed number, correct?

6 A. It was -- it was ultimately data given by Lehman and a
7 formulation in terms of an estimate by Barclays, who would be
8 assuming those liabilities, and obviously agreement at the end
9 in terms of the Lehman team.

10 Q. And it was a billion dollars over the accruals that Lehman
11 had on its books for bonus, correct?

12 A. As of the third quarter, yes.

13 Q. And you'd agree with me, sir, that the billion dollar
14 difference, a hundred percent increase, could not be accounted
15 for by annualizing, correct?

16 A. Yes, I would agree with that.

17 Q. And the arrival at the number of two billion dollars was
18 Barclays agreeing that that was the number. That's why you've
19 described it as an agreed number, correct?

20 A. Yes.

21 Q. And it's your understanding that Barclays had input into
22 that number to determine what its exposure would be for comp,
23 correct?

24 A. Yes.

25 Q. And when you learned about the two billion dollar comp

1 number, if I understood your testimony correctly yesterday,
2 sir, you've never had a conversation with Barclays about what
3 it actually thought it would pay or intended to pay for
4 bonuses. Is that correct?

5 A. I did not have those conversations, no.

6 Q. And you didn't ask in any of your negotiations with
7 Barclays, correct?

8 A. No, I did not.

9 Q. But you would agree with me, sir, that the two billion
10 dollars in comp is a part of the consideration in the asset
11 purchase agreement, yes?

12 A. Yes.

13 MR. BOIES: Objection, Your Honor. Calls for a legal
14 conclusion.

15 THE COURT: Well, I'm going to overrule that
16 objection. He's been examined for two days now on his
17 understanding of this transaction, and he certainly has said in
18 response to earlier questions, that he is familiar with the
19 asset purchase agreement. If he can't answer the question, he
20 can't answer the question. But it doesn't call for a legal
21 conclusion. Overruled.

22 Q. The answer was yes. Is that right, sir?

23 A. Could you repeat the question.

24 Q. As you understood, the comp -- the assumption of
25 liabilities for compensation to be part of the consideration

1 that Barclays was paying in the transaction?

2 A. Part of the total value, yes.

3 Q. So to the extent the total -- that two billion dollar
4 element of total value dropped, sir, the amount of assets that
5 were transferred to Barclays should have dropped if the deal
6 was to remain in balance, as you thought it was, correct?

7 A. If the deal was to remain in balance, yes.

8 Q. And you thought it was a deal that was described to the
9 Court as one in balance, correct?

10 A. Roughly in balance, yes.

11 Q. And you understood --

12 MR. GAFFEY: If I may, Your Honor? Thank you. I'm
13 never sure if they're coming for me.

14 Q. And you understood the deal was one that was to be in
15 balance through the entire process, from the 15th through the
16 closing on the 22nd, correct?

17 A. No. I understood the deal to be Lehman trying to extract
18 the best price for the franchise and the assets. I understood,
19 as we wound down, that it was roughly in balance.

20 Q. And you understood that it was described to this Court as
21 roughly in balance?

22 A. Yes.

23 MR. BOIES: Objection, Your Honor. How it was
24 described in this court is a matter of record. It's not for
25 this witness to testify.

1 THE COURT: Well, I'm going to overrule that objection
2 as well. I mean, this is the same witness who sat right there
3 on September 19th and was cross examined and who made
4 representations to the Court. So he's certainly in a position,
5 more than most others, to be able to answer that question.

6 Q. So you heard the deal described to Judge Peck as one that
7 was in balance, correct?

8 A. Correct.

9 Q. And you never heard anybody describe it as any other type
10 of deal other than one that was in balance, correct?

11 A. That's correct.

12 Q. And you agree with me, do you not, sir, that to the extent
13 the comp number -- the comp assumed liability -- would come
14 down, that should reduce the number of assets that are
15 transferred for the deal to remain in balance, correct?

16 A. I would agree with that.

17 Q. And you'd also agree with me, sir, that to the extent the
18 cure number came down, that should affect the value of the
19 assets being transferred to Barclays for the deal to stay in
20 balance, correct?

21 A. The cure was described as a potential liability.

22 Q. Well, you said that a couple of times, sir, that it was a
23 potential liability. Did you have an understanding when that
24 number was given to this Court in your proffer, that 1.5
25 billion dollars was only a potential that could range from zero

1 to 1.5 billion dollars?

2 A. I had an understanding that it could range from a number
3 lower, not zero.

4 Q. Okay. Something higher than zero?

5 A. Yes.

6 Q. Maybe something higher than a billion?

7 A. I had no specific knowledge of the actual contracts, so I
8 had -- I hadn't formed a view of the specific number.

9 Q. Well, it's a different question, sir. It's what you
10 understood the 1.5 billion to mean when it was given in the
11 proffer of your testimony to this Court. You've described it
12 as a potential for cure liability. Did you understand the
13 potential to have a range of something between zero and 1.5
14 billion dollars?

15 A. No, I did not have it to be zero and the 1.5 number. I --

16 Q. Okay. So we're agreed it's something above zero, up to
17 1.5 billion dollars, correct?

18 A. Yes. Yes.

19 Q. Is it something above a billion to 1.5 billion dollars?

20 A. Again, I had not formed a specific number. All of the
21 integration process had not started, so the specific knowledge
22 of what Barclays had or needed and what Lehman had or needed to
23 run these franchises, was to be forthcoming.

24 Q. Well, you had implored Mr. Lowitt and Mr. Kelly to get
25 that cure number to be as accurate as possible. Is that

1 correct?

2 A. That is correct.

3 Q. And when you implored Mr. Lowitt and Mr. Kelly to get that
4 cure number to be as close to accurate as possible, it was
5 because you understood, this was consideration your company was
6 receiving in this transaction, correct?

7 A. Yes, I did.

8 Q. And you implored Mr. Kelly and Mr. Lowitt to come as close
9 as they could to an accurate number, because you knew that
10 number would be given to this Court in describing the
11 consideration Barclays was paying, correct?

12 A. Yes, that's correct.

13 Q. And at no point, when you were imploring Mr. Kelly or Mr.
14 Lowitt to come up with a cure number, did you tell them to come
15 up with a range between 1.5 billion dollars and something below
16 it, did you?

17 A. No, I did not.

18 Q. You wanted them to come as close as they could to an
19 accurate estimate of the contracts that Barclays would actually
20 need to run the business, correct?

21 MR. BOIES: Objection, Your Honor.

22 THE COURT: What's the objection?

23 MR. BOIES: Misstates what the witness has said.

24 MR. GAFFEY: I'm not citing his prior testimony, Your
25 Honor. It was a question.

1 THE COURT: It's a question about what he wanted. He
2 can either answer that a yes or no. Objection's overruled.

3 A. Could you repeat that, Mr. Gaffey?

4 Q. When you implored Mr. Kelly and Mr. Lowitt to get as
5 accurate a number as possible for the cure amount, it was
6 because you understood this Court was going to be given that
7 number, yes?

8 A. Yes.

9 Q. And another reason that you implored them to make it as
10 accurate as possible is you understood it was the consideration
11 that was going to be given to your company, correct?

12 A. Yes.

13 Q. And at no point did you ask Mr. Lowitt or Mr. Kelly, while
14 you are imploring them to be accurate, to come up with a range
15 to be given to the Court of how high it could be or how low it
16 could be, correct?

17 A. That's correct.

18 Q. Your understanding of the cure number was based -- you
19 understood that on the Barclays side, these vendor contracts
20 would be necessary to the running of the business, correct?

21 A. Yes.

22 Q. So the idea here was to figure out which contracts were
23 mission-critical, figure out what they were worth, and come up
24 with a cure number, correct?

25 A. No, the idea was to come up with a list of all of the

1 vendor contracts.

2 Q. And to come to court and describe it as consideration in
3 the deal?

4 A. Yes.

5 Q. With the understanding, which I think we now have, that to
6 the extent it's below the number given to the Court, for the
7 deal to be in balance, the assets have to drop as well,
8 correct?

9 A. With the understanding that there would be a process after
10 the closing to identify what those actual obligations to be
11 undertaken by Barclays would be.

12 Q. As of the 19th, when you sat in that chair, sir, and
13 testified before the Court, were you attempting, when your
14 testimony was proffered, and 1.5 billion dollars was given to
15 the Court as the estimate for the cure number, to come as close
16 as you could to telling Judge Peck what the cure number
17 actually was going to be?

18 A. Yes, that was the information we had.

19 Q. Now, Mr. Boies asked you a few moments ago about whether
20 there were representations or warranties in the -- going to
21 this idea of a rough equivalence. And your recollection is
22 there were none in the asset purchase agreement. Is that
23 correct?

24 A. That's correct.

25 Q. When you understood the transaction to be described to the

1 Court as one in balance, did you consider that to be making a
2 representation or a warranty to the Court about the nature of
3 the transaction it was being asked to approve?

4 MR. BOIES: Objection, Your Honor.

5 THE COURT: Did he consider it to be a representation
6 to the Court. What's the basis for the objection?

7 MR. BOIES: Assumes a fact not in evidence.

8 THE COURT: Well, I don't know what that fact is.
9 Excuse me?

10 MR. BOIES: It's a when did you stop beating your wife
11 kind of question. He said when you understood the transaction
12 to be described to the Court as one in balance. That's a fact
13 that's not been established.

14 MR. GAFFEY: Your Honor, I think that's been well and
15 truly established.

16 THE COURT: Well, I think that it's certainly been
17 established that that was this witness' understanding of the
18 transaction.

19 MR. BOIES: Yes, Your Honor, that is true. But what
20 counsel just did was framed a question, a predicate of which,
21 was that this Court was told that it was in balance. And I
22 would just ask counsel to identify in the record where counsel
23 believes that happened.

24 THE COURT: Well, rather than have us do that, unless
25 counsel wishes to do that, my suggestion is that we try a

1 different question.

2 BY MR. GAFFEY:

3 Q. It was your understanding, Mr. McDade, that your role as a
4 witness for Lehman, was to describe the transaction to Judge
5 Peck, correct?

6 A. That's correct.

7 Q. And it was your understanding that the transaction you
8 were describing to the Court was one that was roughly to be in
9 balance, correct?

10 A. That's correct.

11 Q. And one of the purposes of your testimony to the Court was
12 to transmit that information about the structure of the deal to
13 the Court, correct?

14 A. Yes.

15 Q. And you understood that the reason for this hearing was so
16 that the Court could understand the transaction and determine
17 whether or not to approve it, correct?

18 A. Yes, I did.

19 Q. So unlike the asset purchase agreement, the contractual
20 arrangement, I'm asking you this question about your testimony
21 to the Court. When you sat there in that chair and gave that
22 testimony about a deal you understood to be balanced, with the
23 understanding Judge Peck was going to take into account what
24 you said in approving it, did you consider that to be a
25 representation to the Court that it was a balanced transaction?

1 MR. BOIES: Your Honor, I object. He's just done it
2 again. He's just said "gave that testimony about a deal you
3 understood to be balanced." And I don't believe that the
4 witness said that, and I ask that counsel, if he's going to
5 keep saying that the witness said that to the Court, that he
6 show the witness and the Court what he's talking about.

7 THE COURT: Well, I'm going to overrule the objection
8 based upon the line of questions leading up to this question.
9 The witness has stated his personal understanding that the
10 transaction was in balance. And he's been asked the question,
11 which I'm now going to recount and perhaps state incorrectly,
12 as to whether or not when he testified, he believed he was
13 making a representation to the Court that the transaction was
14 in balance. That does not mean that he said in so many words,
15 Judge Peck, the transaction is in balance. That rather means
16 that his state of mind at the time he said what he said on
17 September 19, was that this was a transaction he believed to be
18 in balance, and as a result, he viewed his own testimony as
19 being a representation to that effect.

20 Objection overruled.

21 Q. Can you answer --

22 A. Yes.

23 Q. -- the question, sir?

24 A. Yes.

25 Q. Now, you also answered some question from Mr. Boies, sir,

1 about the GFS system --

2 A. Um-hum.

3 Q. -- the global -- could you tell me what GFS stands for?

4 A. It was global finance system.

5 Q. And the global finance system is not something you
6 personally checked in connection with your work around this
7 transaction, correct?

8 A. No. That's correct.

9 Q. And you don't know whether those who were doing the work
10 around the valuation in connection with the transaction,
11 checked the global financial system. Is that correct?

12 A. Just to be clear, the risk operators working from Lehman?

13 Q. Yes.

14 A. Yes, I have no knowledge that they would have checked GFS.

15 Q. And you don't know if the Barclays traders involved in
16 this dynamic process that you described to come up with a
17 value, you don't know if they had access to GFS, do you?

18 A. I don't believe they would have had access to GFS.

19 Q. Well, and in -- well, you don't believe they would have
20 had access to GFS in the course of this collaborative dynamic
21 process in coming up with a book value for Lehman for the 15th
22 and 16th?

23 A. They would have had access to data from GFS, but specific
24 access to a Lehman system at that point in time, with no
25 consummation, no.

1 Q. But you don't know if GFS data was supplied to the
2 Barclays side of the table?

3 A. I don't know.

4 Q. And in your work as president or head of equities, did you
5 have much day-to-day contact with the GFS system?

6 A. I had no interaction with GFS on a day-to-day basis.

7 Q. Okay. An on a day-to-day basis, if you wanted to know
8 anything about the information produced by the GFS system, one
9 of the people you would ask would be the chief financial
10 officer, correct?

11 A. In my role as head of equities, or --

12 Q. In any role you had? If you wanted the best information
13 about GFS, you'd ask the CFO, correct?

14 A. No, you would ask the line operators, depending on the
15 asset class that you were asking the questions about.

16 Q. And --

17 A. You would be at a lower level than the CFO.

18 Q. Okay. And when you wanted to get to the upper level, the
19 final result of whatever purpose GFS had, whether the books and
20 records of the corporation were accurate, you'd look to the CFO
21 for that information, correct?

22 A. Yes, you would.

23 Q. Or you might look to Mr. Kelly for that information,
24 correct?

25 A. Yes.

1 Q. Now, with regard to the daily marking of assets, generally
2 or as reflected in GFS, it is a fact, sir, that not all assets
3 are marked every day. Is that right?

4 A. All assets are -- yes, that's a fact.

5 Q. Some of the more illiquid categories of assets are marked
6 on a more periodic basis, say once a week or once a month even,
7 correct?

8 A. That's correct.

9 Q. And the more liquid assets, say governments or freely-
10 tradable equities, can be marked every day, because there's a
11 market available, correct?

12 A. They are marked every day.

13 Q. Because the books are marked by reference to that type of
14 extraneous data, what's out in the markets, yes?

15 A. That's correct.

16 Q. And with regard to the most common form of equities, just
17 by way of example, that marking does not require, in every
18 case, human intervention, does it?

19 A. All marking -- it doesn't require it in that there are
20 market inputs from trading systems and news services, etcetera.
21 So yes, it's possible that it doesn't require it.

22 Q. And the way GFS worked is, to the extent there were inputs
23 from these market systems, they were automated inputs into the
24 system?

25 A. I don't have the specific knowledge of that.

1 Q. Do you know one way or the other?

2 A. I don't know one way or the other. No specific knowledge.

3 THE COURT: We had almost an objection. But it never
4 made it to the record.

5 MR. BOIES: As to foundation.

6 Q. Now, sir, Mr. Boies asked you if you would describe the
7 five billion dollar element that we were talking about as a
8 discount, and you said no. Do you recall that?

9 A. Yes.

10 Q. Let's move away from that particular now. Would you agree
11 with me that the five billion dollar element we talked about
12 constituted a five billion dollar all-in loss versus Lehman's
13 marks as they stood at the time?

14 A. Yes.

15 Q. And Mr. Boies asked you about --

16 MR. GAFFEY: Can we have Exhibit 2, again, please,
17 Steve?

18 Q. -- Exhibit 2. And I believe in one of your answers you
19 said you had seen different versions of that document?

20 A. Correct.

21 Q. And when you saw the different versions of the document,
22 were they in this format?

23 A. Yes. That became roughly the format of the document.

24 Q. And in the course of your work in connection with the
25 negotiations, you saw these different iterations of this

1 schedule?

2 A. I saw some of the iterations. I'm not sure I saw all of
3 them.

4 (Pause)

5 MR. GAFFEY: Your Honor, may I approach?

6 THE COURT: Yes. Thank you.

7 Q. Mr. McDade, I put before you what is marked as Movants'
8 Exhibit 254, and I'd ask you to take a look through that
9 document, please, all of its pages.

10 (Pause)

11 Q. Let me know when you've had a chance to look through the
12 document sufficient to say you're familiar with its contents,
13 sir?

14 A. Okay.

15 Q. Now, do you know who John Grenier is?

16 A. No, I do not.

17 Q. Do you know Tim Sullivan?

18 A. Yes, I do.

19 Q. Okay. Tim Sullivan is the addressee on this particular
20 e-mail?

21 A. Yes.

22 Q. You see that? And next to the e-mail are what appear to
23 be a series of spreadsheets similar to Movants' Exhibit 2. Do
24 you see that?

25 A. Yes, that's correct.

1 Q. Do these include or are they the iterations of Exhibit 2
2 that you saw during your work around these negotiations?

3 A. I don't have a specific rec -- many of these, I have no
4 recollection of seeing different formats where estimate versus
5 different dates, so no, those aren't familiar to me at all. I
6 don't have a specific recollection to any one in particular.
7 But there would be an example or two, for example, page 7 might
8 have been something that I might have seen, where there were
9 different numbers on the actual document that I would receive.

10 Q. I think what you're saying, sir, is that interleaved
11 between here are some formats that just come to zero or show
12 the adjustment that goes to the next one. Is that right?

13 A. Right.

14 Q. And you didn't see those interim ones?

15 A. No, I did not.

16 Q. But you did see the schedules themselves as they came to a
17 bottom line, yes?

18 A. Yes.

19 MR. GAFFEY: Your Honor, on that basis, I would
20 move -- ask that Exhibit 254 be admitted in evidence?

21 THE COURT: Any objection?

22 MR. BOIES: Yes, Your Honor. It's hearsay. And it
23 can't be being admitted for his state of mind, because he
24 didn't see the whole document. Now, if we limit the pages to
25 the pages that he says he saw, I don't have an objection to

1 admitting it for his state of mind, but not for the truth of
2 the matter asserted.

3 MR. GAFFEY: I'll take it on that basis for now, Your
4 Honor, and see where I can go with it after that.

5 THE COURT: You might as well get what you can get.

6 MR. GAFFEY: Okay.

7 THE COURT: It's admitted on that basis.

8 (Movants' Exhibit 254, e-mail to Tim Sullivan with spreadsheets
9 attached, was hereby received into evidence as of this date.)

10 **Q. Now, let's take a look through some of the pages of the**
11 **document, Mr. McDade. And I'll direct your attention first to**
12 **page 4 of the document.**

13 MR. GAFFEY: And I'll ask that we put on the screen
14 page 4 of the document, and Movants' Exhibit 2. I beg your
15 pardon. I have the wrong page. One second. Page 3. And can
16 you move that over and also put up Exhibit 2?

17 (Pause)

18 **Q. While we get the screen right here, sir, if you would**
19 **compare page 3 of Exhibit 254 with Exhibit 2. What I want to**
20 **ask you to do, sir, is agree with me that this page constitutes**
21 **the final that is ultimately signed by Mr. Berkenfeld. If you**
22 **compare the numbers and take a look at the annotation in the**
23 **lower right-hand corner of that page?**

24 MR. BOIES: Objection, Your Honor. Again --

25 THE COURT: What's the objection?

1 MR. BOIES: -- again, there's a predicate in here,
2 "that was signed by Mr. Berkenfeld."

3 THE COURT: Well, I'm actually confused by the
4 question, because I can't tell which document we're talking
5 about.

6 MR. GAFFEY: I'm not too fond of it at the moment,
7 either, Your Honor. Let me back up -- let me withdraw the
8 question and try this another way, if that's okay?

9 THE COURT: I'm happy to have you start over.

10 MR. GAFFEY: Okay.

11 Q. Sir, all I'm asking you to do at this stage is agree with
12 me that page 3 of the multiple drafts that are within Exhibit
13 254, bears the same numbers as wound up on Movants' Exhibit 2,
14 the final schedule?

15 A. Yes, it does.

16 Q. And you see the annotation in the lower right-hand corner
17 of page 3 that says "9/18/2008 4:33 p.m. BS5 final Tuesday
18 morning." Do you see that?

19 A. Yes, I do.

20 Q. Okay. Now, if you would turn to the last page of Exhibit
21 254, sir, that is the multiple versions of the schedule. And
22 we don't need Exhibit 2 anymore. Take a look at the asset
23 description there, sir. And take note that down the asset
24 side, it adds up to a total of 77.4. Do you see that?

25 A. Yes, I do.

1 Q. All right. And this is identified in its lower right-hand
2 corner as BS1, balance sheet 1. Do you see that?

3 A. Yes, I do.

4 Q. Okay. Now, to your recollection, sir, was there a point
5 where, in the negotiations, the value put on the assets under
6 discussion was in the range of 77.4 billion?

7 A. I've not -- I don't have a recollection of seeing this
8 document, so I have no recollection of that, no.

9 Q. Why don't you go through the whole document and tell me if
10 you have a recollection of seeing any of the pages that are in
11 it?

12 (Pause)

13 A. I can't -- I can't ratify that I have an exact
14 recollection of seeing any of these specific individual
15 documents.

16 Q. Do you have any general recollection of seeing any of
17 them?

18 A. Well, I used an example of page 7 as a general
19 recollection of seeing the iteration of the -- of the form of
20 these.

21 Q. Do you know who prepared -- without regard to this
22 particular document, Mr. McDade. When you testified before
23 about there being various versions of this, do you know who
24 prepared those versions?

25 A. Specifically? No.

1 Q. Generally?

2 A. Generally, it would have been a combination of the
3 advisors and the operatives in the finance department with the
4 advisors, the lawyers and the participants in the -- what we
5 described as the -- you know, the congregating room of all the
6 parties at Barclays and Lehman together.

7 Q. And the finance department you referred to, would that be
8 Mr. Kelly and Mr. Tonucci?

9 A. Correct.

10 Q. And Mr. Kelly and Mr. Tonucci were the people responsible
11 for actually generating the schedule itself, as opposed to the
12 process that led to it. Is that right?

13 A. Generating the data that went into the schedule.

14 Q. Now, with regard, sir, to -- you can put that exhibit
15 aside, Mr. McDade. I want to go back to this topic of whether
16 the books and records were marked after the 12th of September.
17 I think, if I understood your testimony yesterday correctly,
18 you don't have direct personal knowledge of whether that is, in
19 fact, so, correct?

20 A. That's correct.

21 Q. And that the person you would ask to know whether that was
22 in fact so would be Mr. Lowitt, correct?

23 A. Correct.

24 Q. And you would agree that Mr. Lowitt's knowledge of whether
25 or not the books and records were accurate as to mark values on

1 the 15th and the 16th would be greater than yours, correct?

2 A. Yes.

3 Q. And you said that you came to your view that the books had
4 not been marked since the 12th of September, because of
5 personnel problems. Is that right?

6 A. Correct.

7 Q. And by that you meant that on those -- in those particular
8 tough days, there were people leaving. Some weren't showing up
9 at work, some were leaving in the middle of the day. You had a
10 bit of mayhem on the personnel side, yes?

11 A. The majority of the employees left on Sunday evening.

12 Q. And you did not take an effort on Monday or Tuesday --
13 that is the 15th or the 16th of September -- to determine one
14 way or the other, whether sufficient personnel were on the
15 premises to mark the books on the 15th and the 16th?

16 A. I did not, personally.

17 Q. You didn't have a conversation with anybody about that?

18 A. I did not.

19 Q. You inferred -- you put two and two together to determine
20 that because a lot of people were out, it was possible the
21 books hadn't been marked, correct?

22 A. Correct.

23 Q. You had no knowledge as to whether the books hadn't been
24 marked?

25 A. I had no specific knowledge.

1 Q. I believe you said, sir, that your understanding of the
2 asset purchase agreement -- when you were talking to Mr. Boies
3 about compensation exposure, I think I heard you say that it
4 was your understanding that Barclays was required to take all
5 of the Lehman employees?

6 A. All of the Lehman employees in this transaction, yes. Not
7 all of Lehman globally.

8 Q. Okay. So anyone -- it was your understanding of the
9 agreement that Barclays had an obligation to hire anyone on the
10 Lehman -- on the LBI payroll, on the North American broker-
11 dealer payroll?

12 A. North American. For a period of ninety days.

13 Q. Isn't it a fact, sir, that the deal was actually
14 structured so that certain people were deemed to be critical --
15 that was the so-called elite eight, yes?

16 A. Yes.

17 Q. And below that level, the contract required approximately
18 200 more relatively senior executives, correct?

19 A. A percentage of the 200.

20 Q. A percentage of the 200. And below that, a percentage of
21 the total workforce, correct?

22 A. I don't have a specific recollection of that piece.

23 MR. GAFFEY: May I consult for one moment, Your Honor?
24 I may be able to shorten this some.

25 THE COURT: Okay. That's fine.

1 Q. Mr. McDade, I want to go back sort of to where I started
2 in this phase, and remind you of the question and answer in Mr.
3 Boies' cross of you last evening: "At the time the transaction
4 was presented to the Court, based on everything you know now,
5 do you believe that the transaction was presented to the Court
6 in a fair and balanced way?" And your answer was: "Yes, I
7 do."

8 I want to explore a little bit the idea of what you know
9 now. You didn't mean to suggest with that answer, sir, that
10 had there been an embedded first-day gain in the transaction
11 for Barclays, which was not disclosed to the Court, that it
12 would have been accurately disclosed -- disclosed in a fair and
13 accurate way. Is that right?

14 A. The total value of the transaction, an accounting
15 interpretation of which I have no specific knowledge of how it
16 was determined, specific to asset balance sheet items, as
17 opposed to the total value that we -- that we described in the
18 courtroom, I have no knowledge of how that would have occurred,
19 and I don't have an issue with how it was described, given the
20 total value that was described.

21 Q. What I'm addressing, I think, is something slightly
22 different. Yesterday you told us that you had no knowledge of
23 a first-day gain for Barclays embedded in the structure of the
24 transaction, correct?

25 A. That's correct.

1 Q. And yesterday you told us that if there had been an
2 embedded first-day gain for Barclays in the structure of the
3 transaction, that would be inconsistent with the deal that you
4 made, correct?

5 A. I'm --

6 MR. BOIES: Objection, Your Honor.

7 THE COURT: What's the objection?

8 MR. BOIES: I would ask that the witness be shown his
9 testimony, because I don't think that accurately describes it.
10 He's now purporting to summarize the witness' testimony --

11 THE COURT: Well --

12 MR. BOIES: -- as opposed to asking --

13 THE COURT: -- I concur that there may be a
14 questioner's bias in the way the question has been phrased, but
15 it is cross-examination, and we have a sophisticated witness,
16 and the record speaks for itself. And he can -- we're not
17 going to have him mislead, but he's certainly in a position to
18 answer the question.

19 MR. BOIES: Your Honor, I won't argue, but it's not
20 cross-examination. This is their witness.

21 THE COURT: I understand. It's redirect.

22 THE WITNESS: Could you repeat it? I'm sorry.

23 MR. GAFFEY: Could we read the question back, Your
24 Honor? Is that -- we can't. It's the unofficial court --

25 THE COURT: We'll read the question back and we'll see

1 if maybe after it's reread we want to stay with it.

2 MR. GAFFEY: Let me go straight to rephrasing it.

3 BY MR. GAFFEY:

4 Q. You agreed in your testimony yesterday, sir, did you not,
5 that if there had been an embedded first-day gain for Barclays
6 on acquisition, in the structure of this transaction, that
7 would have been inconsistent with the deal that you made?

8 A. Gain as described for total value. That's correct.

9 Q. And if there had been such an embedded first-day gain for
10 Barclays in the transaction, you would have wanted that
11 disclosed to the Court, correct?

12 A. As described in the total valuation, yes.

13 Q. And you sat through the hearings on the 17th of September
14 and the 19th of September in full, correct?

15 A. Yes, I did.

16 Q. And you did not hear a word said about an embedded first-
17 day gain in the structure of the transaction for Barclays, did
18 you?

19 A. There was none.

20 Q. Given that, sir, is it your testimony, you think if there
21 were such an embedded first-day gain for Barclays, you would
22 think the deal was presented to the Court in a fair and
23 balanced way?

24 A. If there were a first-day gain to Barclays embedded in the
25 deal, in total value?

1 Q. Yes.

2 A. Embedded in the deal? That would not have been a fair
3 representation.

4 MR. GAFFEY: I have nothing further, Your Honor.

5 THE COURT: Okay, the other movants are not
6 choosing --

7 MR. MAGUIRE: Nothing further, Your Honor.

8 THE COURT: -- to redirect. Mr. Boies are you
9 choosing to recross?

10 MR. BOIES: I am, Your Honor.

11 RECROSS-EXAMINATION

12 BY MR. BOIES:

13 Q. Mr. McDade, you were asked a number of questions about
14 something called an embedded first-day gain. Do you recall
15 that?

16 A. Yes.

17 Q. What is an embedded first-day gain, as you understand that
18 term?

19 A. My understanding, it's an accounting gain for assets minus
20 liabilities -- balance sheet assets and liabilities.

21 Q. And was there anything inconsistent with your
22 understanding of the transaction or the description of the
23 transaction to the Court, with there being an accounting gain
24 for Barclays on the first day?

25 A. No.

1 Q. You said no?

2 A. No.

3 Q. And when you answered counsel's question about a gain, and
4 you said "as described in the total valuation," I want to
5 follow up on that. Am I correct that what you were referring
6 to is that to the extent the deal ended up being in rough
7 balance, it was rough balance with respect to the assets and
8 liabilities that had actually been valued in the process?

9 A. Assets and liabilities valued and assumed payments for
10 cure and comp.

11 Q. Yes. And it did not include assets that were not valued,
12 like intangibles, perhaps furniture and furnishings. Whatever
13 the assets were that were not valued, that was not included in
14 what you called the rough balance, correct?

15 A. That was not included, with the view that those assets, to
16 a nonoperating, ongoing concern Lehman, would have been of
17 little value.

18 Q. All right. And I just want to emphasize that. When you
19 talked about assets and liabilities being -- or ending up being
20 in rough balance, you were talking about the assets and
21 liabilities valued from Lehman's perspective, not from
22 Barclay's perspective, correct?

23 A. That's correct. I'd have no ability to understand how
24 Barclays would value that.

25 Q. And there were a number of assets that might have little

1 or no value to Lehman as a nonoperating company, that might
2 have substantial value to Barclays as an operating company,
3 correct?

4 A. Yes, I would agree.

5 Q. And if that difference resulted in a first-day gain for
6 Barclays, that was in no way inconsistent with your
7 understanding of the deal, correct?

8 A. Yes.

9 Q. Let me ask you to go to Movants' Exhibit 254 which counsel
10 showed you. Did Barclays have any role in preparing any of
11 these pieces of paper, as you understand it?

12 A. As I understand it, preparation of the document -- if
13 you're talking about the data acquired for the document itself,
14 no. If you're talking about the document itself, it was a
15 collaborative effort with Michael Klein, Mark Schaffer and the
16 deal operatives and the lawyers, etcetera.

17 Q. Now, counsel asked you whether the approximately five
18 billion dollar number that you had heard somebody talk about
19 represented a loss as it stood at the time, from Lehman's
20 books. Do you recall that?

21 A. Yes, I do.

22 Q. Was that because, as you understood it, Lehman's books
23 were stale and outdated?

24 A. It's because the markets had changed dramatically, and
25 they hadn't been marked since Friday night.

1 Q. Counsel also asked you whether it was unusual to have the
2 value on a company's books be determined by negotiations with a
3 single buyer. Do you recall that?

4 A. Yes, I do.

5 Q. And you said it was unusual, correct?

6 A. Yes.

7 Q. Was this an unusual situation?

8 A. Extraordinary.

9 Q. Was it usual to have a situation in which the only
10 alternative to selling these assets was liquidation and
11 bankruptcy?

12 A. Very unusual.

13 Q. And was it unusual to have only one buyer or potential
14 buyer for these assets, at that time?

15 A. Yes.

16 Q. Counsel also asked you a number of questions about what
17 was described to the Court. Do you recall that?

18 A. Yes, I do.

19 Q. Do you recall the Court being told -- and this is for
20 counsel's benefit, at page 47 of Movants' Exhibit 261 -- that
21 as of that day, Lehman was only selling assets that have a
22 value of 47.4 billion dollars, and Barclays is assuming
23 liabilities, however, of 45.5 billion dollars in connection
24 with those assets?

25 A. Yes, I do.

1 Q. Do you recall anybody saying that this deal was a wash, to
2 the Court?

3 A. No, I don't recall that.

4 Q. Do you recall anybody saying that the deal was in balance,
5 to the Court?

6 A. The exact words "in balance", I don't have a specific
7 recollection of that.

8 Q. You told counsel that Mr. Lowitt would be better than you
9 at determining the accuracy of Lehman's marks. Do you recall
10 that?

11 A. Yes.

12 Q. Who would be better, if anyone, than Mr. Lowitt?

13 A. Mr. Kelly.

14 MR. BOIES: Thank you. I have no more questions.

15 MR. GAFFEY: Just one or two more, Your Honor, if I
16 may? It was a new issue that was raised by Mr. Boies' --

17 THE COURT: All right.

18 MR. GAFFEY: -- questioning.

19 FURTHER REDIRECT EXAMINATION

20 BY MR. GAFFEY:

21 Q. With regard to intangibles, sir, the value of intangibles,
22 do you have any knowledge of any discussions with anyone at
23 Barclays about the value of intangibles during these
24 negotiations?

25 A. Specific knowledge -- my specific knowledge? No.

1 MR. GAFFEY: Nothing further, Your Honor.

2 THE COURT: We've come to the end. You're excused.

3 Thank you.

4 THE WITNESS: Thank you, Your Honor.

5 THE COURT: It's 12:15, and it occurs to me this might
6 be a good time to break, rather than start with a new witness.

7 MR. GAFFEY: It's fine with me, Your Honor.

8 THE COURT: I assume it's fine with everybody. We'll
9 take a break till -- let's call it just before 2:00, so we can
10 maybe jump the gun on the afternoon, since we're taking a
11 slightly early lunch. How about we resume at 1:45?

12 (Recess from 12:13 p.m. to 1:50 p.m.)

13 THE COURT: Be seated, please.

14 MR. GAFFEY: May I proceed, Your Honor?

15 THE COURT: Let's proceed.

16 MR. GAFFEY: Movants call Steven Berkenfeld.

17 (Witness duly sworn)

18 THE COURT: Be seated, please.

19 MR. GAFFEY: Thank you, Your Honor. May I approach
20 with a witness book for the witness and the Court?

21 THE COURT: Yes.

22 DIRECT EXAMINATION

23 BY MR. GAFFEY:

24 **Q. Good afternoon, Mr. Berkenfeld.**

25 **A. Good afternoon.**

1 UNIDENTIFIED ATTORNEY: You haven't given --

2 MR. GAFFEY: Oh, I beg your pardon. I've made the
3 same mistake.

4 THE COURT: It's payback. Please proceed.

5 MR. GAFFEY: Just trying to keep it even.

6 Q. Good afternoon, Mr. Berkenfeld.

7 A. Good afternoon.

8 Q. Mr. Berkenfeld, have we met before?

9 A. We have.

10 Q. When did we meet, sir?

11 A. During my deposition.

12 Q. And have we spoken at any time since then, other than --

13 A. Just greetings today.

14 Q. And you are currently employed by Barclays Capital. Is
15 that correct?

16 A. That's correct.

17 Q. And you are a managing director in the investment banking
18 division there?

19 A. That's correct.

20 Q. And you report to Skip McGee. Is that correct?

21 A. Yes, that's correct.

22 Q. Who was also formerly employed by Lehman?

23 A. Yes.

24 Q. Now, for context, sir, you recall, do you not, that the
25 sale transaction that's brought us here today, closed on

1 September 22, 2008. Is that correct?

2 A. Yes, that is.

3 Q. And prior to December (sic) 22, 2008, had you had
4 discussions with anyone concerning the prospect of future
5 employment at Barclays?

6 A. Before the closing on September 22nd?

7 Q. That's right, sir.

8 A. No, I did not have discussions with anyone about future
9 employment at Barclays.

10 Q. And to be clear, sir, my question would encompass
11 discussions amongst your then-coworkers at Lehman about the
12 prospect of going over to Barclays. Did you have any such
13 discussions with them?

14 A. I did not have any of those discussions.

15 Q. And when you did first have discussions about joining
16 Barclays, the issue was raised with you by Mr. Ian Lowitt. Is
17 that correct?

18 A. That is correct.

19 Q. Mr. Lowitt came to see you about being offered employment
20 at Barclays after the closing. Is that right?

21 A. The first discussion I had about employment at Barclays
22 was with Ian Lowitt after the closing.

23 Q. And to your knowledge, other senior officers at Lehman had
24 discussions prior to the closing on September 22nd, with
25 Barclays, about being employed by Barclays after the closing,

1 correct?

2 A. To my knowledge there was a group of employees who had
3 discussions prior to the closing, in the context of negotiating
4 the asset purchase agreement. During that time frame, that
5 week, there were some discussions with employees about
6 employment at Barclays.

7 Q. And to your knowledge, was one Mr. Lowitt one of those
8 people?

9 A. I don't know what discussions Ian had directly.

10 Q. Do you know if he had any?

11 A. I don't know if he had any.

12 Q. Now, sir, I'd like to turn to what role, if any, you had
13 with respect to the sale transaction, as well as your
14 recollections concerning the role of others. You were not
15 involved in the negotiation of the business terms. Is that
16 correct?

17 A. That's correct. I was not involved in negotiating the
18 principal terms dealing with business terms of the purchase
19 agreement. That's correct.

20 Q. You were not involved?

21 A. I was not.

22 Q. And you were involved in what you have referred to as the
23 lawyering of the asset purchase agreement. Is that right?

24 A. I think that describing it as involved in the lawyering of
25 the purchase agreement is a fair description. To be clear, to

1 me what that means is not being involved with negotiation of
2 the business terms --

3 Q. Of the economic terms?

4 A. -- of the economic terms. Not drafting the purchase
5 agreement, which was being done by outside counsel.

6 Q. Well, the primary drafters were the lawyers at Weil
7 Gotshal, correct?

8 A. That's my understanding, yes.

9 Q. And you sat with the lawyers from Weil Gotshal and
10 participated, if not with pen in hand, in the drafting process.
11 Is that about right?

12 A. To describe my role as being involved in the lawyering of
13 the transaction, at some point in the process, I joined the
14 table, the group of lawyers who were sitting around going
15 through the purchase agreement, and reviewing it to make sure
16 that it reflected the terms of the transaction as it was being
17 described to us.

18 Q. And fairly described, sir, that would constitute being
19 involved in the preparation and drafting of the asset purchase
20 agreement. Is that correct?

21 A. Not on my part. I joined those discussions, I would say
22 pretty late in the process. My role was much more around how
23 was Lehman Brothers going to operate now that we were in
24 bankruptcy. So the bankruptcy filing happened in the middle of
25 the night Sunday into Monday, hitting Monday, it was chaotic

1 from my standpoint. And there were hundreds of questions that
2 were coming in, unprecedented first impression, things that we
3 had no time to prepare for, things that we hadn't thought
4 through.

5 And so my role, really, for Monday and most of Tuesday,
6 and actually continuing on through closing, was -- maybe the
7 best way to describe is somewhat of an air traffic controller,
8 as these issues were coming in; resolving the ones I could and
9 then shipping out the ones that were in better hands, whether
10 with the other lawyers -- internal lawyers involved, Weil
11 Gotshal, Simpson Thacher, integrating Alvarez & Marsal, getting
12 them involved.

13 So I was not involved -- I wouldn't describe it as sitting
14 around drafting provisions. I did come into those discussions
15 at some point, probably on Tuesday, and get an understanding of
16 the agreement, and reviewed it, and evaluated whether I thought
17 it represented the transaction as it was being described to me,
18 mostly by Weil Gotshal. But I wouldn't characterize it as
19 being involved at an early stage.

20 Q. You would not characterize it as being involved in the
21 drafting and preparation of the asset purchase agreement?

22 A. I don't -- I think that overstates it.

23 Q. Okay. In the book we've put before you, sir, is your
24 deposition transcript. Could you turn to that? Let me know
25 when you've gotten to it in the binder, sir.

1 A. Which section is it?

2 Q. It ought to have a tab on it that says --

3 A. Oh, transcript.

4 Q. -- yes. You got there? And if you would, sir, turn to
5 page 28 of your deposition transcript? It's page 28 starting
6 at line 23. Do you have it there, sir?

7 A. Page 28?

8 Q. Correct?

9 A. Yep.

10 Q. And at page 28, starting at line 23, I put you the
11 following -- I made the following statement and then asked the
12 following question:

13 "Q. Yeah, that's what I said. There may have been more. Just
14 so our record is clear, there may not be a complete list."

15 I beg your pardon. I'm on the wrong page. At 26 at line
16 24, I asked you the following question:

17 "Q. We'll come to that agreement. Obviously, I'm going to
18 spend some time with it today, but do you have a general
19 recollection -- let me ask you, were you involved in the
20 negotiations of the asset purchase agreement?

21 "A. I was involved in the preparation and drafting of the
22 asset purchase agreement."

23 Was that a true statement when you made it, sir?

24 MR. SCHILLER: For completeness, Judge, I'd ask my
25 friend to turn to page 29 where he repeats the question at line

1 8, and he gets an answer consistent to what you just heard.
2 Lines 8 through line 5 of the next page, I'd also like read,
3 Your Honor.

4 MR. GAFFEY: Your Honor, could I have an answer to the
5 question I asked, and then I'll move on to that?

6 THE COURT: I think we can do that. Also, I think,
7 just for the sake of good order, while I understand the desire
8 to include deposition references in context, thereby reading,
9 on occasion, material that goes beyond the quoted excerpt, I
10 think that there should be a formal objection, rather than a
11 calling out. I think that at some level, this is a matter for
12 cross, rather than for interjection, and prefer not to have
13 anybody's examination interrupted needlessly. I consider that
14 a needless interruption.

15 MR. SCHILLER: Okay, Judge. Thank you.

16 Q. So, Mr. Berkenfeld, the question is, when you answered, "I
17 was involved in the preparation and drafting of the asset
18 purchase agreement", was that true testimony at the time that
19 you gave it?

20 A. It's true testimony. I believe it's a shorthand answer to
21 the question. A simplification.

22 Q. You were involved in the preparation and drafting?

23 A. I was involved, yes.

24 Q. And others were involved as well, including lawyers at
25 Weil Gotshal?

1 A. That's correct.

2 Q. And working on the preparation and drafting of the asset
3 purchase agreement was within the ambit of things that you were
4 doing that week?

5 A. Within the ambit? I would rather say --

6 Q. You were doing other things?

7 A. -- it was one of many --

8 Q. Okay.

9 A. -- things. Hundreds of things that I was doing in the
10 course of that week.

11 Q. Now, your recollection is that the economic terms were
12 dealt with by Bart McDade, Skip McGee, Mark Schaffer and
13 others. Is that right?

14 A. Yes, that's correct. On behalf of Lehman.

15 Q. On behalf of Lehman. And from the Barclays side, your
16 recollection is, it was Mr. Ricci, Archie Cox and Michael
17 Klein, as Barclays' chief negotiators. Is that correct?

18 A. As chief negotiators, I think that's correct. Yes.

19 Q. And others at the executive level in Barclays were
20 involved on the Barclays side of the table in the negotiations.
21 Is that right?

22 A. That's correct.

23 Q. And one of those people was Bob Diamond?

24 A. I didn't see Bob Diamond at all at the negotiations,
25 although I didn't know who Bob Diamond was at the time. But I

1 don't have a recollection of interacting with Bob Diamond at
2 all.

3 Q. You had no discussions with him?

4 A. I had no discussions with Bob Diamond.

5 Q. And the business deal that we're discussing was negotiated
6 over the course of Monday, September 15th into the morning
7 hours of Tuesday, September 16th. Is that correct?

8 A. The business deal --

9 Q. Yes.

10 A. -- did you ask? Yes, that would -- I think that's the
11 correct timeframe, from early on Monday into Tuesday morning.

12 Q. And after the business deal was reached, the economic
13 terms, that's when the process of drafting it into an asset
14 purchase agreement began. Is that right?

15 A. That's not how I recall it.

16 Q. How do you recall it?

17 A. I think there was some work that was already being done on
18 the asset purchase agreement. We wouldn't have had enough time
19 to put together an agreement in those couple of hours on
20 Tuesday. So my recollection is that Weil Gotshal was already
21 working on a form of asset purchase agreement, that of course
22 went through many modifications. But I think that the work on
23 the agreement itself, the shell, probably also got started at
24 some point on Monday. I wouldn't know exactly when.

25 Q. And the process of drafting and finalizing an asset

1 purchase agreement ended either very late the night of the 16th
2 or extremely early the morning of the 17th. Is that right?

3 A. Finalizing the agreement? I believe that it was finalized
4 the afternoon -- Tuesday afternoon, the 16th.

5 Q. Now when you first -- you mentioned before that you had a
6 lot to do. You were air traffic controller. And you only got
7 next to the Weil Gotshal lawyers a little later in the process.
8 When you joined the drafting folks, did you have an
9 understanding of the business terms?

10 A. When I joined the drafting folks?

11 Q. Yes.

12 A. No, I think as I joined the drafting folks, that's how I
13 got the understanding of the business terms.

14 Q. You were playing some degree of catch-up on the business
15 terms when that started. Is that right?

16 A. I think that's a fair characterization, yes.

17 Q. And that would be on the Tuesday after the economic terms,
18 to your understanding, had been agreed?

19 A. I don't know exactly when the economic terms were agreed
20 to, but it happened sometime before I got involved in the
21 process.

22 Q. And to your knowledge, sir -- to your knowledge, the Weil
23 Gotshal lawyers involved in the drafting process were
24 documenting what was being told to them by the business people.
25 Is that correct?

1 A. To my knowledge they were documenting what was being told
2 by the business people. And some of the Weil attorneys were
3 very much in the middle of the discussions.

4 Q. On the asset purchase agreement side?

5 A. On the asset purchase agreement side. That's correct.

6 Q. Let me show you, sir -- actually, if you'd just turn to
7 tab -- well, let me ask you this first. In the course of the
8 negotiations, who was involved in valuing the assets to be
9 transferred?

10 A. We had our marks as of Friday. There was a process
11 starting Monday to review those marks and come up with an
12 agreed, then-current market valuation, with everything that had
13 happened in the intervening time. So at close of business
14 Friday, we weren't expecting to file for bankruptcy over the
15 weekend. Markets were very volatile. That's an
16 understatement. They were chaotic. Going into Monday and
17 Tuesday, there was an effort on the way to look at the current
18 market positions and for the sides to figure out what was an
19 appropriate then-current market valuation. I didn't observe
20 any of those, but everyone was very aware that that was going
21 on.

22 Q. You didn't observe it, and you weren't personally involved
23 in that process. Is that right?

24 A. I was not personally involved and I was not in the room as
25 it was going on. But I knew that it was going on, that Lehman

1 personnel and some of the Lehman executives that -- guys like
2 Eric Felder and Jim Seery and Alex Kirk were involved in this
3 process of coming up with then appropriate marks, given what
4 was going in on the markets at the time.

5 Q. And two of the senior executives that the lawyers were
6 relying on were Paolo Tonucci and Martin Kelly. Is that right?

7 A. I wouldn't say they were relying on them for the marks.
8 The marks come from the businesses, the people who are closer
9 to what's going on in the markets. Paolo and Martin were in
10 the finance staff. They wouldn't have known what was happening
11 to government securities. They wouldn't have known what was
12 happening to Omega Corporate equities, because they could see
13 what's coming across the tape.

14 But there would have known commercial papers, some of the
15 other securities positions that were being transferred over.
16 So they might have been a position of aggregating that. I
17 don't know. But they were not the ones that, at that point in
18 time, were actually marking the positions.

19 Q. They were the people who -- the lawyers in the room,
20 outside counsel, Weil Gotshal, Simpson Thacher and you, were
21 relying on them to put together the list of assets that were
22 the assets that were estimated at the time to be transferred
23 over to Barclays, though. Isn't that right?

24 A. Relying on who?

25 Q. Tonucci and Kelly?

1 A. We were getting information from them about the security
2 positions that were being transferred over. There's a
3 reference in the purchase agreement to securities positions
4 that are being transferred. They were a conduit for that.
5 They were, perhaps, aggregating that information. I don't
6 think we were relying on them for that. I don't know if that's
7 the way I would characterize it.

8 Q. To your knowledge, sir, you were relying on them to put
9 together a schedule of the assets to be transferred. Is that
10 correct?

11 A. I know we'll get more into the schedule, but I don't think
12 we were looking to them for a schedule. The asset purchase
13 agreement, on its face, was pretty clear that there would be
14 securities positions transferred over that had a book value of
15 approximately seventy billion. That's what the asset purchase
16 agreement said. We weren't asking for a schedule of those
17 assets, much like there'd be schedules attached to most asset
18 purchase agreements. Most transactions of an asset purchase
19 there are hundreds of pages of schedules attached that go
20 through everything from every piece of furniture, in this case,
21 every particular security. We weren't looking for them to put
22 together a schedule that defined the agreement, if that's what
23 you're asking.

24 Q. Was there a schedule prepared in connection with the
25 transaction?

1 A. There was a schedule prepared.

2 Q. And who put that schedule together?

3 A. My understanding was that it was put together by the
4 finance department.

5 Q. And by finance department, you mean Mr. Lowitt and Mr.
6 Tonucci and Mr. Kelly. Is that right?

7 A. Or people that worked for them in the finance department.

8 Q. Well, you and the other lawyers in the room were depending
9 on Mr. Tonucci and Mr. Kelly to put that schedule together,
10 were you not?

11 A. No, I wouldn't say we were depending on it. I think that
12 the schedule, which I initialed, is being somewhat overstated
13 in terms of what its role was in the transaction. The
14 transaction was the asset purchase agreement. We were not
15 depending on them. The schedule had a very -- in my mind, as
16 the person who initialed it -- a very specific and limited
17 purpose. And I don't -- I wouldn't say that we were depending
18 on them or the transaction was dependent on that schedule. The
19 transaction, as negotiated by the principals, was reflected in
20 the asset purchase agreement. The schedule was not part of the
21 asset purchase agreement.

22 Q. We'll get to the part about what the role of the schedule
23 was, sir. Right now, my question is for the purpose of
24 preparing that schedule, you and the other lawyers were relying
25 on Tonucci and Kelly to prepare it. Is that correct?

1 A. The schedule was being transmitted to us by Martin Kelly
2 and Paolo Tonucci. I think primarily Martin. That's where we
3 got it from. That's the way I think I prefer to describe it.
4 I think that's more accurate. I don't think we were sitting
5 around relying on them to deliver a schedule or waiting for
6 them to deliver a schedule. That wasn't driving the
7 negotiation or the drafting.

8 Q. Do you have your transcript handy?

9 A. Um-hmm.

10 Q. Could you turn to page 36? I'm directing your attention
11 to the question that begins at line 15 and the answer that
12 continues through page 37, line 12.

13 A. Page 36, line 15?

14 Q. We're starting at page 36, line 15.

15 A. Um-hum.

16 Q. And I asked this question -- these questions, and you gave
17 these answers:

18 A. Yes. You never asked me which was worse.

19 Q. Beg your pardon, sir?

20 A. You never asked me which was worse.

21 Q. "Q. Tell me what you know about what they did to get that
22 schedule put together?

23 "A. Tuesday was a very -- as was Monday -- crazy and hectic
24 day.

25 "Q. I'll ask you later which was worse."

1 I'll try to ask you that today.

2 "A. And people were involved in different tasks.

3 "Q. Um-hum.

4 "A. In somewhat of a vertical approach. You might have been
5 involved in many different verticals but this was all hands on
6 deck.

7 "Q. Right?

8 "A. Paolo Tonucci, who was the treasurer of Lehman, and Martin
9 Kelly, who was the comptroller, were two of the most senior
10 people on the finance staff. So the people in the room,
11 myself, outside counsel, Weil Gotshal, Simpson Thacher on
12 behalf of Lehman Brothers, were relying on them to put together
13 the list of assets that were the assets that were estimated
14 that at the time would be transferred over to Barclays."

15 Do you see those questions and those answers?

16 A. Yes.

17 Q. Did you give truthful answers to those questions when I
18 asked them to you?

19 A. Yes.

20 Q. So I'll ask you again. Were you relying on Kelly and
21 Tonucci to deliver the schedule estimating the assets to be
22 transferred over to Barclays in the transaction?

23 A. We were relying on them to put together the list of
24 assets.

25 Q. And at the time Mr. Kelly was the treasurer of Lehman,

1 correct?

2 A. No. That's not correct. Mr. Kelly was the comptroller,
3 and Paolo Tonucci was the treasurer. Did I mishear your
4 question? I'm sorry.

5 Q. No, I misread it. Mr. Tonucci was the treasurer and Mr.
6 Kelly was the comptroller, correct?

7 A. Yes.

8 Q. Okay. Would you turn, sir, to tab M-2 in your book? It's
9 Exhibit Movants' (sic) 2 in evidence, the schedule that we've
10 been talking about. I suppose I should ask you, that's the
11 schedule we've been discussing, correct?

12 A. Correct.

13 Q. And in the upper right-hand corner of that schedule, there
14 are the initials, S.B. Are those your initials, sir?

15 A. Yes, they are.

16 Q. And above that is the date, September 16th '08?

17 A. That's correct.

18 Q. And in your handwriting, sir, that's the word "final"?

19 A. That's correct.

20 Q. Before putting your initials on that piece of paper, sir,
21 had you seen prior versions of that schedule?

22 A. Yes.

23 Q. Had you seen prior iterations of it with different
24 calculations, other than the ones that are shown there?

25 A. When you say iterations what do you --

1 Q. Different versions. You know, one that had a number
2 higher or lower, for example, than 72.65?

3 A. If you're repeating the question. I saw prior schedules
4 that had somewhat different numbers. I don't recall what those
5 numbers were, though.

6 Q. Now, why did you -- well, you put your initials and the
7 word "final" on the schedule that's marked as Movants' 2 to
8 acknowledge that this was the final schedule. Is that correct?

9 A. That's correct.

10 Q. And to acknowledge that you had received final signoff on
11 that schedule from finance, as to the schedule of assets and
12 liabilities, correct?

13 A. I think it was to mark the final schedule. Because as you
14 had mentioned, there were previous drafts. They were changing.
15 There had been one earlier than this, and people said it might
16 have been final. And then another one came. And I said, okay,
17 this one is the final. I actually believe I might have
18 initialed an earlier one, and then we got another schedule and
19 I initialed this one with the word "final".

20 Q. Let me see if I can remind you that. You put your
21 initials on another draft that had a 500 million dollar error,
22 correct?

23 A. I don't recall.

24 Q. It had some kind of error on it?

25 A. I don't recall. I don't know if it was an error. I don't

1 know.

2 Q. Do you recall resigning a schedule and writing the word --
3 adding the word "final" to indicate that the one with the word
4 "final" on it was the final schedule?

5 A. Yes.

6 Q. Okay. The other versions of the schedule prior to the one
7 that you signed, sir, that you said you saw, did they indicate
8 estimates of the assets that were made during the negotiation
9 process between Lehman and Barclays?

10 A. I don't know.

11 Q. Did you know at the time?

12 A. I don't know that I did.

13 Q. Did you have any knowledge at the time about anything
14 concerning the negotiation process between Lehman and Barclays
15 that led to the completion and your signing of that final
16 schedule?

17 A. As I mentioned before, I knew that there was a process
18 that was ongoing between principals of Barclays and Lehman
19 representatives to come up with what were the appropriate marks
20 for these securities positions at that time, given what was
21 going on in the market and what had changed since the prior
22 marks on Friday.

23 MR. GAFFEY: May I approach, Your Honor?

24 THE COURT: Yes.

25 (Pause)

1 MR. SCHILLER: Your Honor?

2 THE COURT: Yes, sir.

3 MR. SCHILLER: Before the examination begins, this was
4 an exhibit that was objected to with the last witness on
5 hearsay grounds. I'm going to make the same objection here.

6 MR. GAFFEY: Now?

7 THE COURT: So far, the only thing that's happened is
8 that I've been handed a document. The use of the document has
9 not yet occurred, but I understand that there is an objection
10 to any use of the document that would result in the
11 impermissible introduction of hearsay evidence, either through
12 the witness or through the document, so.

13 MR. GAFFEY: My understanding, Your Honor, is it's in
14 for the limited purpose of the state of mind of the prior
15 witness.

16 THE COURT: It was admitted for that purpose, and I
17 think I also said something to the effect that you should get
18 what you can get at the time that you get it.

19 MR. GAFFEY: Yes, Your Honor.

20 THE COURT: And it was put in at that time for the
21 limited purpose as stated at that time. It, as a result, can
22 still be used in the same manner.

23 MR. GAFFEY: Thank you, Your Honor.

24 BY MR. GAFFEY:

25 Q. Mr. Berkenfeld, would you take a look through Movants'

1 Trial Exhibit 254, and tell me if the collection of schedules
2 annexed to that document are documents -- are documents of the
3 type that you saw before you signed Movants' Exhibit 2?

4 A. I don't recall having seen any of these schedules. I
5 certainly don't recall any schedule that had two columns in it,
6 like the one on page 1 and 2. This -- I've never seen these
7 before. I've never seen the cover note. I have no knowledge
8 of this.

9 Q. Now, do you recall, sir, that when the final schedule, the
10 one that you initialed, was put together, it was delivered into
11 the room of negotiators by Mr. Kelly and Mr. Tonucci?

12 A. I recall that it was delivered into the room of lawyers,
13 not negotiators, in the corner conference room where everyone
14 was sitting around the table working through the agreement.
15 That's where I saw it. I don't know what was delivered into
16 the negotiators.

17 Q. So what you remember is Mr. Kelly and Mr. Tonucci bringing
18 that schedule into the room for lawyers working on the drafting
19 of the asset purchase agreement?

20 A. My recollection is I remember Martin Kelly bringing it in,
21 not them bringing it in together.

22 Q. Now, do you know the source of the numbers on Movants'
23 Exhibit 2?

24 A. I do not.

25 Q. Well, you know, sir, that it was from the finance

1 department, correct?

2 A. Yes.

3 Q. And by the finance department, you included Kelly and
4 Tonucci, correct?

5 A. Yes.

6 Q. And the adjusted total assets number on that schedule,
7 sir, of 72.65 billion, do you recall, sir, that this was an
8 estimate of the assets that would be transferred over from
9 Lehman to Barclays?

10 A. Maybe it's best if I describe what I thought this schedule
11 was?

12 Q. I don't mean to be rude, sir, but if you'd answer my
13 question --

14 A. Could you repeat your question?

15 Q. Do you recall that that schedule was an estimate of the
16 assets that would be transferred over from Lehman to Barclays?

17 A. I viewed this schedule as an estimate, as guidance, of
18 what the allocation of securities would be that was referenced
19 in the purchase agreement. The reason it was important to me,
20 important enough to initial, is that the purchase agreement
21 said that there would be assets with a book value of
22 approximately seventy billion and it listed government
23 securities, commercial paper, corporate debt, corporate equity.
24 It didn't say whether that was sixty-nine billion of government
25 securities and one billion of corporate equities or whether it

1 was one billion of government securities and sixty-nine billion
2 of corporate equities. It's just that seventy billion of all
3 these different types of securities. And to me the
4 significance of this schedule was that it gave guidance. A
5 rough estimate of how that seventy billion -- and also on the
6 liability side, too, on the short positions, how that was
7 allocated across these very different -- different risk
8 profile, different volatility securities. So, it mattered to
9 me a lot when the government number was forty, as indicated, or
10 sixty-nine or one. And so, to me the significance of the
11 schedule was not that it defined the agreement, it was not part
12 of the agreement. It wasn't attached to the agreement. It
13 really -- it wasn't incorporated by reference. The agreement
14 was the purchase agreement. To me, the point of this was to
15 provide some guidance around what was meant by the purchase
16 agreement when there was a number for long positions and a
17 number for short positions.

18 Q. And the long position that you're referring to is the long
19 position described in the asset purchase agreement itself, yes?

20 A. Yes.

21 Q. And what this schedule is meant to do is to take that
22 seventy billion dollar book value long position described in
23 the asset purchase agreement and break it down into its
24 component parts?

25 A. That's correct.

1 Q. And the reason that that adds up to more than seventy
2 billion is it also takes into account the residential -- the
3 mortgage basket, correct?

4 A. Yes. The mortgages were covered in another subsection of
5 the purchase agreement.

6 Q. Okay. When you take the 2.7 shown on the asset side for
7 mortgages out of the total of assets, you come to roughly the
8 seventy billion dollar book value long position described in
9 the asset purchase agreement, is that right?

10 A. That's correct.

11 Q. And that's how that schedule relates to the asset purchase
12 agreement that was executed on the 16th of September, correct?

13 A. In my mind that's how it related, yes.

14 Q. And that's what you mean when you describe it as guidance
15 for the deal, is that right?

16 A. A guidance for that provision or of the asset purchase
17 agreement, yes.

18 Q. And in total, it was guidance for the value of the total
19 assets that it afforded to allocate that would be transferred
20 in the long position, correct?

21 A. The guidance for the assets in that section of -- that one
22 section of the asset purchase agreement that referred to
23 securities positions and defined as long positions, yes.

24 Q. And it was your understanding that there would be a
25 transfer of the assets that were approximated on the

1 allocations and Movant's Exhibit 2, the schedule?

2 A. My understanding was that the asset purchase agreement
3 contemplated that approximately seventy billion book value
4 would be transferred over, broken up into these categories,
5 into these components.

6 Q. And at the time -- well, let me -- you mentioned the
7 liability side. The source for the numbers -- the figure with
8 regards to comp shown there, was also the finance department,
9 correct?

10 A. When I referred to the liability side, I was referring to
11 the securities positions above that. But not to the final two
12 items.

13 Q. Let me ask you about those final two items. Do you know
14 the source of that two billion dollar liability for comp that's
15 listed on the schedule?

16 A. I actually don't know what the source was.

17 Q. Well, you know that the source of all the numbers on the
18 schedule was the same source, the finance department, correct?

19 A. I think what I said before was I don't know that they were
20 the source. For instance, they weren't the source of the
21 marks. I don't know if that came from the finance department,
22 it came from the HR department. If it was part of the business
23 deal.

24 Source means the original source to me. It was
25 transmitted to us through the finance department but I didn't

1 view them as the source, necessarily, of those numbers. I
2 didn't know.

3 Q. Could you turn to page 60 of your deposition? And I'm
4 going to direct your attention, sir, on page 60 to lines 9
5 through 19. And I ask you these questions and you gave these
6 answers.

7 "Q. Do you know it is?

8 "A. It's a liability for -- of two billion for comp that's
9 estimated on the schedule.

10 "Q. Do you know the source of that two billion liability for
11 comp that's listed on the schedule?

12 "A. The source of all the numbers on this schedule were the
13 same source, from our finance department.

14 "Q. That would be Kelly/Tonucci?

15 "A. Correct."

16 Is that truthful testimony when you gave it, sir?

17 A. Truthful testimony? I think what I said now was more
18 precise.

19 Q. Was the source of all the numbers on that schedule the
20 finance department, in general, and, in particular, Kelly and
21 Tonucci?

22 A. I don't know if they were the original source in those
23 numbers.

24 Q. Now --

25 A. The original source is the distinction I'm making between

1 source and -- where was I getting it from? I was getting it
2 from the finance department. That was my source.

3 Q. So, the lawyers --

4 A. I don't know if they were the original source of putting
5 together those numbers. I mean that's a distinction that I
6 didn't make at the time of deposition, but for me I was getting
7 it from the finance department. I don't know if they were the
8 ones that created those numbers or they also got them from
9 someone else.

10 Q. Okay. So, the state of your knowledge as one of the
11 people involved in the lawyering is that this schedule comes
12 from Kelly and from Tonucci, correct?

13 A. My understanding, my knowledge, at the time was that the
14 schedule was produced, I know quotes don't work in the
15 transcript, but that -- it was created by them. I don't know
16 if they were the source of all the numbers. I don't know where
17 all --

18 Q. I've heard you say that, sir. I'm breaking it down into
19 some slightly smaller parts.

20 A. Okay.

21 Q. When you're at the table involved in the preparation and
22 drafting of the asset purchase agreement with the other lawyers
23 and you're in the room with the lawyers into which this
24 schedule, marked as M-2, is delivered. The source to you of
25 the schedule is finances; Kelly and Tonucci?

1 A. Yes.

2 Q. Yes. Okay. And you're knowledge about where they got the
3 numbers on that schedule, you don't know where they got the
4 numbers, is that correct?

5 A. That's correct.

6 Q. So, your information stops at Kelly and Tonucci. You know
7 they delivered a schedule but you don't know what went into
8 calculating the figures on that schedule?

9 A. That's correct.

10 Q. But you did understand that on the asset side that the
11 asset classes shown on that schedule were based on Lehman's
12 marks, correct?

13 A. My understanding was that those valuations reflected what
14 was referred to in the purchase agreement at the book value at
15 the time. And that reflected the agreement that had been
16 reached since the marks on Friday. I was aware that there was
17 a process going on to come up with values for these assets. I
18 knew that if it was starting on Monday we were working off of
19 close of day on Friday and those marks were no longer really
20 relevant to what was going on on Monday or Tuesday.

21 Q. Do you have your deposition there?

22 A. Yes, I do.

23 Q. Could you turn to page 62, please? And directing your
24 attention to line 20 through page 63, line 7. Are you there?

25 A. Um-hmm.

1 Q. And you, just for context, sir, you'll see that Movant's
2 Exhibit 2 was Deposition Exhibit 19? You notice that? I just
3 want to put the question in context.

4 A. Yes.

5 Q. Okay.

6 "Q. Again, for 19, sir, do you know if the figures there on
7 the asset side for those asset classes of government agency,
8 commercial paper, etcetera, bore any relation to the marks at
9 which they were shown on Lehman's books?

10 "A. My understanding is that they were based on the marks.

11 "Q. How did you get that understanding?

12 "A. From the same source. Again, in the delivery of the
13 schedule from Martin and Paolo.

14 "Q. Did they say something to you?

15 "A. I don't recall exactly what they said."

16 Were those answer's truthful when you gave them at your
17 deposition?

18 A. They were and I think they're consistent with what I said.
19 The valuations were based on marks that started as of Friday
20 and then were revised to reflect what the mark should have been
21 as of Monday and Tuesday.

22 Q. We'll come to that, sir.

23 A. Okay.

24 Q. Was that truthful testimony when you gave it?

25 A. Yes.

1 Q. Your understanding is that the figures on the schedule
2 that were delivered to you by Kelly and Tonucci were based on
3 Lehman's marks?

4 A. No. I said they were based on "the" marks. When you say
5 just "the" marks --

6 Q. Do you think they were based on Barclays' marks, sir?

7 A. No.

8 Q. All right. What marks were you referring to when you said
9 "the marks" in your deposition? Are you referring to Lehman's
10 marks?

11 A. I don't think we had then current marks as of Monday.
12 It's sort of within the context of what was going on where we
13 had just filed for bankruptcy and the markets were as chaotic
14 as imaginable. I don't think that there was a real time
15 marking going on by these guys at a Lehman system independent.

16 So, based on the marks at the time -- there wasn't a close
17 of books on Monday with Lehman's marks in the ordinary course
18 of business, as I understand it, like there had been for all
19 the prior days in the week before and the years before. It was
20 a different situation, different context. Do I believe that
21 they were based on the marks? Yes. Do I believe that they
22 started with the marks on Friday to arrive at marks that were
23 relevant for Monday and then Tuesday? Yes.

24 Q. So, at your deposition when you said, "My understanding is
25 that they were based on the marks", what you were trying to

1 tell me was they were based on Friday's marks as adjusted into
2 Monday based on a process in which you were not involved. Am I
3 understanding your testimony correctly, sir?

4 A. No. At the time I gave -- I answered a question that you
5 posed to me at the time and you didn't ask me any follow-up
6 questions at the time. And that was a truthful answer at the
7 time. They were based on the marks. But it was a more
8 complicated question and it required a more complicated answer.

9 Q. I just want to explore a little bit by you meant with the
10 two word phrase, "the marks" at your deposition. By "the
11 marks", did you mean the number that was generated through a
12 process that was not in the ordinary course of business to
13 generate what should have been the marks?

14 A. I meant they were based on the then relevant current
15 marks.

16 Q. And the then relevant current marks were as of the 16th of
17 September when that schedule marked as M-2 was generated?

18 A. Yes.

19 Q. And that's what the asset purchase agreement described it
20 to be. Is that correct?

21 A. The asset purchase agreement, again, separating the
22 schedule and the asset purchase agreement, the asset -- the
23 schedule was not part of the asset purchase agreement. It very
24 easily could have been. It would have taken two words to
25 attach it to the back of it and say this is what we mean by

1 book value of seventy billion of securities position. It
2 wasn't. It deliberately wasn't.

3 Again, I think that the significance of the schedule was
4 somewhat overstated. You know, there were a lot of
5 sophisticated lawyers in that room from the top law firms.
6 They knew that schedule was being prepared. It would have been
7 a very simple matter to just incorporate it and it wasn't done.
8 It was not meant as part as the asset purchase agreement. And
9 I think -- you know, I said that at the time of my deposition
10 too.

11 Q. Would you take a look, sir, at the asset purchase
12 agreement which is in evidence as Exhibit M-1? It's in your
13 book. And turn to page -- well, first let's turn to the last
14 page. And just for the sake of good order, sir, is that your
15 signature?

16 A. For Lehman Brothers Holdings and Lehman Brothers, Inc.,
17 yes it is.

18 Q. You signed for both entities?

19 A. Yes.

20 Q. All right. And you read this before you signed it?

21 A. Yes.

22 Q. And you understood it at the time that you signed it on
23 behalf of both of those entities, correct?

24 A. I believe that I did.

25 Q. Okay. Take a look at page 6, sir. And directing your

1 attention, in particular, to the definition of purchased assets
2 subsection (d) which reads as follows, quote, "Government
3 securities, commercial paper, corporate debt, corporate equity,
4 exchange traded derivatives and collateralized short term
5 agreements with a book value as of the date hereof of
6 approximately seventy billion, collectively, long positions."

7 You see that?

8 A. Yes.

9 Q. Now, as I understand your testimony, sir, you understood
10 that to be a reference to the guidance that was in the schedule
11 which we've marked as Exhibit M-2. Although the schedule was
12 not itself incorporated into the AP, is that right?

13 A. No. I'm not sure I caught all that but if you say that
14 was a reference to the schedule?

15 Q. Let me withdraw the question and try it another way.

16 The description of long position in the asset purchase
17 agreement, derives, as it says "from the book value as of the
18 date hereof". Is that correct?

19 A. Yes, sir.

20 Q. Was Lehman's book value for the long position as of the
21 16th of September seventy billion dollars?

22 A. I don't know for sure.

23 Q. Did you know for sure at the time you signed the asset
24 purchase agreement?

25 A. No, I don't think I did.

1 Q. If the -- what's referred to in there as book value of the
2 long position was, in fact, a negotiated value between Lehman
3 and Barclays, it would have been a simple matter too to put in
4 a couple of words in the asset purchase agreement to say so.
5 Isn't that correct?

6 A. Yes, it would have been.

7 Q. And you were involved in the drafting of this agreement,
8 correct?

9 A. I was involved in the drafting of this agreement.

10 Q. And you put your sig --

11 A. But I was not a drafter of the agreement and I did sign
12 it, yes.

13 Q. And when you signed it, sir, on the 16th of September, you
14 knew it was going to be submitted to this Court as the
15 description of the transaction the Court would be asked to
16 approve, correct?

17 A. Yes.

18 Q. Now, in your -- what post did you -- what was your title
19 at Lehman on the 16th of September? You're head of legal audit
20 and compliance then. Is that right?

21 A. Going back to pre-bankruptcy? The Friday?

22 Q. Yes. What were you on the 15th?

23 A. Or the 14th. I had a few different jobs. One was
24 chairman of our transac -- investment banking transaction
25 approval committees. One was chief investment officer private

1 equity and principal investing. And the third which you're
2 referring to was the head of the legal compliance of audit
3 division.

4 Q. Okay. And in none of those positions, sir, was it your
5 job to assess what was the current book value of assets that
6 Lehman owned, correct?

7 A. That's correct.

8 Q. And in none of those positions, did you have any
9 involvement in assessing what was the book value of positions
10 that Lehman owned, correct?

11 A. No. I think that might be something of an overstatement.
12 I did have involvement, for instance, on the private equity
13 side and the principal investment side and we went through a
14 process of marking those positions. Not on a daily basis but
15 at private positions. But that process of marking those with
16 something in my role -- in that role, I had involvement in.
17 Did I have a role in marking these types of securities listed?
18 No, I did not.

19 Q. And in the process with which you were familiar on the
20 private equity side, you had some familiarity with how book
21 value was determined on a daily basis, correct?

22 A. Well, on the private equity side, we would value it at the
23 fair market value.

24 Q. Fair market. Okay. And that was the value that was held
25 in Lehman's books, correct?

1 A. My understanding was that's correct.

2 Q. So, that would fairly be described as Lehman's book value,
3 would it not?

4 A. For those positions, that's correct.

5 Q. Okay. And for those positions, the process involved an
6 internal valuation by Lehman with access to public record
7 information or computer modeling or other data available to
8 Lehman, correct?

9 A. Are you referring to these positions?

10 Q. No, I'm referring to the private equity valuations you
11 said you were involved in.

12 A. Could you repeat the question?

13 Q. They were internal evaluations conducted -- developed by
14 Lehman for the purpose of measuring fair market value for
15 Lehman's books.

16 A. There were internal valuations based on many factors.

17 Q. Okay.

18 A. Including external value.

19 Q. And in your experience in your private equity capacity
20 when you were involved with this, you never once saw an episode
21 where the book value of a position was determined by the
22 negotiation with a single purchaser for the entire position,
23 did you?

24 A. We were not selling the business. We were not selling the
25 firm. So, there wouldn't have been an opportunity for one

1 single buyer to weigh in on what the book value was. But if
2 you're asking the question, and one my positions was chairman
3 of the fairness opinion committee, so before the firm, the
4 investment banking division, would deliver a fairness opinion
5 around a MMA transaction, it would be brought to committee and
6 we would go through the analysis.

7 Do I think it is relatively common for a purchaser in an
8 asset purchase agreement and potentially even a stock purchase
9 merger although it's not as relevant 'cause they're buying
10 stock, but an asset purchase agreement to weigh in and have a
11 view on what the book value of those securities were? Yes, if
12 that's what you're asking me. Absolutely. I don't know that
13 there's too many financial institution's transactions that
14 occur without the buyer having their own view on what book
15 value is. No buyer looks at the books of a seller and says
16 you've marked all of these assets at this level, fine with us.
17 You know, we'll buy it at that level. It's a negotiation
18 between a buyer and seller on what the appropriate value is.
19 If it wasn't that way, then all the financial institutions in
20 the world would trade at book value but they don't. They trade
21 at premiums and discounts and there's different views on what
22 is book value depending on what those assets are. And in the
23 context of a sale of a business, there will be a negotiation
24 between a buyer and a seller to determine what is an agreed
25 upon book value especially around an asset purchase agreement

1 where a buyer is buying a portion of the business of, in
2 particular, of national institutions.

3 Q. So, the process you're describing is, if I can shorten it
4 a bit, a negotiated price, yes?

5 A. It's a negotiated -- I'm not shortening it a lot, it's a
6 negotiated price, but the price is sort of the second tier.
7 You start with the negotiation of what do you think the assets
8 are worth and then you decide what you're going to pay for the
9 business based on what those assets are worth, based on what
10 the going concern might be. I mean it's a -- it's a process.
11 You make a deal. But the first step or one of the first steps
12 of a buyer in looking to buy assets is to come up with their
13 own view of what the value, the fair market value, of those
14 assets they're buying. And they would not, in very rare cases,
15 just accept the book value of the seller.

16 Q. Well, a buyer would say to the seller, your book value is
17 too high. I'm going to pay you less. Yes?

18 A. Well, they might -- that's where it might start but say
19 let's actually go through these assets and let's go through a
20 process where we determine what is an appropriate book value
21 for these assets.

22 Q. Seller carries its assets at a hundred bucks and the buyer
23 says I'll give you eighty and the price is ninety. And that's
24 the agreed price below the book value of the seller.

25 A. Yeah, but I'm --

1 Q. Is that right, sir?

2 A. -- referring to something different than that.

3 Q. Maybe you can infer this. Seller carries its assets at a
4 hundred bucks. Buyer says he'll give you eighty. They agree
5 on ninety. The price is below the seller's book value, yes?

6 A. That's not what I was describing. But the answer to your
7 question is yes. But that's not what I was describing. I was
8 saying that you're carrying your assets at a hundred. We're
9 going in and doing due diligence, we actually think those
10 assets are worth eighty-five. But then from that point,
11 there's still a negotiation on price. But there is always a
12 discussion on the book value of assets if you're a buyer buying
13 assets. I think that's a part of any -- of any well
14 negotiated, well lawyered transaction.

15 Q. Let's talk about a well disclosed transaction. Was the
16 description of the seventy billion dollar long position that
17 was submitted to this court that described it only as book
18 value, was that meant to tell the Court about this process of
19 purchaser involvement in determining what the book value should
20 have been by expressing its views?

21 A. I don't know what's intended to disclose to the Court in
22 this context. My view is that seventy billion book value as of
23 the date hereof is an accurate statement of the party's
24 agreement of what those securities positions were worth as of
25 that Tuesday in a very unprecedented and volatile market.

1 So, I think that it was a joint process, it was a
2 bilateral process, but there was discussions around what's the
3 appropriate book value. I didn't expect that Barclays would
4 take the marks of Lehman and say, you know, yeah, load up
5 seventy billion at whatever you marked it at. It was a
6 discussion. And it was an agreement on what the appropriate
7 book value of those securities were as of that date.

8 Q. Was your assumption there based on the assumption that the
9 value of the assets to be transferred were relevant in the
10 transaction?

11 A. My -- I would say yes to some extent. That's right.

12 Q. Now, when you said you didn't know what was meant to be
13 disclosed to the Court, let me to ask you to put your head of
14 legal compliance and audit hat back on on the 15th of
15 September. In that capacity, did you have any concern that the
16 transaction for the sale of the firm would be accurately
17 disclosed to this Court?

18 A. Did I have a concern about that?

19 Q. Yes.

20 A. Not with Weil Gotshal representing us.

21 Q. Okay.

22 A. And also Weil Gotshal being involved in both the drafting
23 and negotiation of the asset purchase agreement and with them
24 representing us in bankruptcy court. I had hired Weil Gotshal.
25 I hired them deliberately because my view is that they were the

1 best we could get to go through this bankruptcy process.

2 Q. And that said, when you reviewed the asset purchase
3 agreement before you signed it, you understood one of the
4 things that would happen with that agreement is the next day it
5 would be submitted to this Court for its review and potentially
6 for its approval?

7 A. Yes. Yes, I understood that.

8 Q. And you understood that the asset purchase agreement would
9 be one means by which the transaction was described to the
10 Court, correct?

11 A. Correct.

12 Q. And you understood that the asset purchase agreement would
13 be included in a motion asking for the Court's approval of the
14 transaction, correct?

15 A. Correct.

16 Q. And you did take the time to be sure that you read it and
17 understood it before you signed it?

18 A. Correct.

19 Q. Now, prior to the time that you signed the asset purchase
20 agreement, you had never had any discussions with anyone on the
21 Lehman's side of the table about any discount off of Lehman's
22 marks. Is that correct?

23 A. I was not aware of any discount off of the then current
24 marks. To be clear, again, there was this process where marks
25 were changing from where they were on Friday which was our last

1 official mark of our book. And I knew that on Monday and
2 Tuesday, there was this process of what are the appropriate
3 marks of these securities positions based on everything that
4 had gone on since the Lehman bankruptcy. So, I was aware of
5 that. But from those marks at the then current fair market
6 value, I was not aware of any discount off of that mark.

7 Q. And you understood that the Friday was the last official
8 marks on your books?

9 A. That was my understanding.

10 Q. And did you have that understanding at the time?

11 A. I believe I did.

12 Q. So, that would make the book value according to the last
13 official marking of the books, whatever was shown on the books
14 as of the 12th, correct?

15 A. Could you repeat the question?

16 Q. That would make the value to be the last value shown on
17 the books when they were last officially marked, correct?

18 A. The value of what?

19 Q. Let me try this another way. Come the 16th, the Tuesday,
20 if I understand your testimony, sir, it was your understanding
21 that the books had not been marked at all since the prior
22 Friday, the 12th of September, is that right?

23 A. My understanding was that we hadn't gone through our
24 normal course mark to market process on Monday.

25 Q. Had any of the mark to market process been followed, to

1 your knowledge, between Friday the 12th of September and Monday
2 the 15th of September?

3 A. Between those two dates?

4 Q. Yes, sir.

5 A. You mean over the weekend?

6 Q. Yeah.

7 A. I don't think that there was any marking of the book over
8 the weekend.

9 Q. Okay. What about by the end of Monday? Had there been
10 any marking of the books during Monday the 15th, do you know?

11 A. I think just within the context of this transaction. I
12 don't know if we were going through -- I don't know if we were
13 going through our independent marked process. Some of that is
14 automated, but a lot of it isn't. So, I don't really know what
15 was going on. Monday was an unprecedented day.

16 Q. And when you say some of it is automated, the more liquid
17 assets are those that tend to be updated on an automated basis,
18 correct?

19 A. It's beyond my area of expertise, but there are certain
20 securities like government securities and corporate equities
21 where there's a very liquid market and it's easy enough to just
22 pull marks off of trading information, trading systems.

23 Q. Okay. Let's go back to Exhibit M-2, please, and you see,
24 sir, that on the asset side of that schedule, the bulk of the
25 assets are government securities, correct?

1 A. Correct.

2 Q. And this is the allocation within the entire long position
3 that you told us about before, correct?

4 A. Correct.

5 Q. So, government securities to your knowledge are -- can be
6 marked on an automated basis, correct?

7 A. I don't know first-hand.

8 Q. Okay. Do you know if the forty billion dollars in
9 governments shown on this schedule dated the 16th of September
10 was marked down from whatever the last official books were?

11 A. I don't know.

12 Q. Did you know at the time that you signed this schedule?

13 A. I did not.

14 Q. Did you know at the time you signed the asset purchase
15 agreement?

16 A. I did not.

17 Q. So, as far as you knew, sir, when the asset purchase
18 agreement described as seventy billion dollar long position to
19 the extent it included government securities, when it said
20 "long position on the book value as of the date hereof", it was
21 talking about a book value on the 16th of September, on
22 Tuesday?

23 A. I never saw book values from Friday. So, I don't know how
24 those positions changed from Friday.

25 Q. Other than the testimony of Mr. McDade, Mr. Berkenfeld,

1 can you tell us what your basis is for the understanding that
2 the books had not been marked since the 12th of September?

3 A. Just the chaos that was going on at the time.

4 Q. Okay. And you sat in the courtroom and heard Mr. McDade's
5 testimony?

6 A. I sat -- I was in the courtroom this morning, yes.

7 Q. And you heard Mr. McDade say that he had not had
8 conversations with anybody in particular about whether the
9 books actually had been marked on the 15th and the 16th. Did
10 you hear that?

11 A. I guess I did. I don't recall it.

12 Q. And you heard Mr. McDade say that he was inferring from
13 the chaos that chances are that people involved in marking the
14 books were not available to mark the books, correct?

15 A. I did read the complaint. There was some preparation
16 going into this. I remember beyond his testimony things I
17 think in your own complaint, I believe, that said there was no
18 one answering the phone. There was no one there to do the
19 work. It was in a lot of the materials before I came to
20 testify.

21 Q. Okay. So, your understanding that the books hadn't been
22 marked since the 12th of September was based on reading the
23 movant's complaint?

24 A. No. No. It was also based on what was going on at the
25 time. We were not in ordinary course of business mode. I

1 think that's where I started. We were in something that -- the
2 context is important here. We had people with no basis,
3 whatsoever, just rumor and innuendo, coming into the office on
4 Sunday night packing up their personal belongings and thinking
5 that the doors were going to be locked the next day.

6 People were in a state of shock. They were stunned. They
7 were not performing their ordinary duties. A big part of what
8 I was trying to do was try to get us to figure these issues out
9 and operate in as much of an ordinary course as we could and
10 bringing in whatever systems we could from Alvarez & Marsal,
11 from Weil Gotshal. It was not -- it's not fair to characterize
12 this as a normal operating day where everybody was there doing
13 their jobs marking their position. It wasn't like that. And
14 it wasn't like that from Monday into Tuesday and, frankly,
15 although some of the panic had subsided after there was an
16 agreement that had been announced, it wasn't like that for the
17 remainder of the week either. There was a lot of uncertainty
18 and unfortunately people just didn't come in, put their heads
19 down, and do their normal course of job. It was very difficult
20 and people were dealing with issues they hadn't done before.

21 So, from my standpoint as air traffic controller, yes, I
22 was aware that we were trying to hold something together and
23 keeping things from crashing. But we didn't think, given that
24 we just filed for bankruptcy at the holding company, that -- we
25 weren't really concerned about a potential SEC books and

1 records violation Monday night because we hadn't marked our
2 position. That's just not the mindset at the time.

3 Q. Let's go back to my question. The basis of your
4 understanding that the books had not been marked since
5 September 12th, as I've got it so far, are the movant's
6 complaint and the general chaos that was in existence in the
7 early part of the week. Is that a fair summary of your
8 testimony, sir?

9 A. And I would add that the involvement of some of the people
10 who would normally be involved in it at the end of the day in
11 the process of the asset purchase agreement.

12 Q. So, I guess we can agree that in your view Monday was very
13 extraordinary time for Lehman, yes?

14 A. That's one way to characterize it.

15 Q. Okay. And the manner in which the books were kept, if at
16 all, was not in the ordinary course of business, correct?

17 A. Correct.

18 Q. So whatever would constitute the book value of the long
19 position on the 16th of September would be a book value that
20 was determined in the most extraordinary of circumstances,
21 correct?

22 A. Correct. It was a much more manual process involving some
23 of the senior leaders of the firm who normally wouldn't be
24 involved in a mark to market process.

25 Q. Okay. And these senior leaders of the firm understood as

1 you did that the descriptions of the transaction given to the
2 Court were descriptions upon which it would rely in determining
3 whether or not to approve the transaction. Did you have that
4 understanding at the time?

5 A. I did. I wouldn't say that the other senior executives
6 involved in that process necessarily did. Most of them --
7 well, I don't know if any of them were lawyers. They wouldn't
8 have thought through that the process they were going through
9 was going to end up in a motion in front of the bankruptcy
10 court. So, I wouldn't characterize it that way.

11 Q. Okay.

12 A. From my standpoint, yes.

13 Q. Well, from your standpoint as head of legal compliance and
14 audit, that is certainly something that would have crossed your
15 screen, yes?

16 A. Yes.

17 Q. Okay.

18 MR. GAFFEY: Can we have page 6 of the asset purchase
19 agreement again, please?

20 Q. And when this description of long positions stated only as
21 "with a book value as of the date hereof of approximately
22 seventy billion", collectively long positions, did you give
23 some thought, sir, to whether the extraordinary out of the
24 ordinary course of business chaotic way in which book value was
25 determined should have been disclosed to the Court so that

1 interested parties would know?

2 A. I don't know that my thought process went that way. I
3 think that the chaos in the markets was very evident to anybody
4 who was paying attention to what was going on.

5 Q. So, anybody --

6 A. I think I used the term then and used in depositions that
7 we were on the brink of a financial Armageddon. And what had
8 happened subsequent to the Lehman bankruptcy over the course of
9 Monday or Tuesday was unprecedented.

10 Q. Let's just --

11 A. I'm sorry.

12 Q. I beg your pardon. Let's just back up a little bit.

13 A. So, I -- to me, did I recall a deliberate thought process
14 that said the Court may need to be informed that marks of
15 positions are uncertain right now? That there's a lot of
16 volatility in the market? I don't recall that but I think it
17 was pretty apparent to anybody who was paying attention to what
18 was going on in the world.

19 Q. So, anybody who was paying attention to what was going on
20 in the world, would read "with a book value as of the date
21 hereof of approximately seventy billion" to actually mean
22 through a negotiated process unprecedented means history to
23 determine what should have been a book value because there
24 wasn't one. Have I got that right?

25 A. I don't think I said that.

1 Q. Did you give any thought, sir, as to whether a more
2 detailed description of what constituted book value should have
3 been given to the Court when you signed this agreement to be
4 submitted to it?

5 A. I did not give that thought. I relied on my counsel to
6 the asset purchase agreement and my bankruptcy counsel, Weil
7 Gotshal. Who's involved in both to make the determination of
8 how the transaction should be presented to the Court.

9 Q. And at the time that you signed the asset purchase
10 agreement, you had not had any discussions with anyone on the
11 Lehman's side of the table about a discount off of the marks,
12 whatever the marks were. Correct?

13 A. I was not aware of any discount from the then current
14 marks.

15 Q. And you were not aware of any agreed bulk discount
16 concerning the assets that were to be transferred in the
17 transaction, correct?

18 A. Again, I was not aware of any discount from the current
19 market valuation at that time.

20 Q. Bulk or otherwise?

21 A. Bulk or otherwise.

22 Q. And at the time of the transaction, you had no information
23 concerning the economics of the transaction because that had
24 been done by others, correct?

25 A. Had no information? No. I would say that I had

1 information that was given to me primarily as I recall from
2 Weil Gotshal about what the terms of the transaction were.

3 Q. Whoever your source was, sir, before you signed the
4 agreement, you had never been informed that the economics of
5 the transaction involved a five billion dollar overall loss to
6 Lehman versus its marks, had you?

7 A. I'm not sure what you mean by a five -- I think you said
8 that the transaction resulted in a five billion dollar loss? I
9 wouldn't characterize it that way. I would say the markets
10 resulted, if it is a five billion dollar loss, I don't know
11 what it was before or after. But it wasn't the transaction
12 that resulted in it. It was that the markets had moved so
13 dramatically since Friday. So, we had a loss and, probably, so
14 did most of the other firms on Wall Street. Anyone who had
15 securities positions might have had a loss depending on what
16 their positions were. Maybe they were short mortgages and had
17 a gain. But it wasn't a loss from the transaction. It was a
18 loss from what was going on in the market. It was a mark to
19 market and the valuation, the current market valuation, of
20 those securities positions changed since Friday. Since Friday,
21 Lehman filed for bankruptcy. It shocked the world. It changed
22 the world. And because of that, in a circular way, the
23 positions that we had on Friday were worth less on Monday. So,
24 if there was a loss, and, again, I never did the before and
25 after, I wouldn't say it's from the transaction, I would have

1 said it was from the markets.

2 Q. Whatever its cause, you were never informed that a
3 transaction involved a five billion dollar overall loss to
4 Lehman versus its marks, were you?

5 A. I was never informed that. I didn't think that our loss,
6 after we had filed for bankruptcy off of our marked positions
7 on Friday, was really all that relevant. We were already
8 bankrupt. I don't know how many more losses we could have had.

9 So, it's, again, the mindset at the time. I'm not saying,
10 boy, we had a terrible day in the market; we lost a lot of
11 money. We would have filed for bankruptcy. It was at that
12 point as a standalone entity, game over. The loss we had on
13 all the securities positions we had or the game we had in those
14 securities positions was not a focal point for me and many of
15 the -- well, I should say what other people's focal point was,
16 but it wasn't a focal point for me. I wasn't thinking about
17 this transaction or what was happening in the markets as
18 creating a loss. It just wasn't a relevant point.

19 The relevant point was and the relevant point going into
20 this transaction was how do we make the best out of this
21 situation? This -- what's left of this firm will quickly fall
22 apart. And the way we looked at the transaction was this is an
23 opportunity, to some extent, keep at least the North American
24 business and some other subsidiaries together and to give
25 people jobs. We weren't thinking about it in terms of a loss

1 off a book value.

2 Q. Were you thinking about it at all in terms of preserving
3 value for the creditors of the corporation?

4 A. Yes.

5 Q. So, in addition to the jobs for the people you worked
6 with, you were thinking about the value for creditors who would
7 make claims in these proceeding?

8 A. Yes, as to Lehman.

9 Q. And when you say whether there was a loss was not a
10 relevant point, did you think it would be relevant to the Court
11 proceedings or to the creditors who would attend those Court
12 proceedings whether Lehman had agreed to sell its assets for
13 five billion less than it showed on its most recent marks?

14 A. Again --

15 Q. If you could start with a yes or no, I'll give you a
16 chance to explain. If you could just answer the question with
17 a --

18 A. Then I would say, no.

19 Q. Okay.

20 A. The loss on the marks, again, was because of what happened
21 in the market. That was out of our control. The fact that
22 there were mark to market paper losses on the securities
23 positions that were held at the time, Monday, Tuesday, was not
24 the way we're thinking about it. If they move down and those
25 securities positions were being transferred over to Barclays, I

1 think what was relevant was what was the current market value
2 at the time they were transferred. Not -- what they were
3 marked at on Friday, wasn't relevant to me. It was no longer
4 applicable. It didn't -- it was a context that was completely
5 different. And marks as of Friday and whether that mark was
6 down five billion or one billion or ten billion from Friday was
7 not, again, something that came out of the transaction. It
8 came out of the markets.

9 Q. Okay. Now, when you looked at the definition of purchased
10 assets in the agreement when you signed it, did you give some
11 thought to whether instead of saying, "with a book value as of
12 the date hereof of approximately seventy billion," you could
13 have said the current market value at the time they are
14 transferred? Would that have been a more accurate description?

15 A. In hindsight, it probably would have been but at the time
16 of what was going on, no one made the suggestion to change it
17 and I'm not sure where the term "book value" originally came
18 from. Whose term it was?

19 Q. It could be a mistake, yes?

20 A. I don't know that I'd characterize it as a mistake, I just
21 don't know.

22 Q. But in any event, you would agree with me that a
23 description, to use the term you just used, the current market
24 value at the time they were transferred, would be an accurate
25 description of the long position, correct?

1 A. The way I was thinking of it was it was the current market
2 value of those securities at that time?

3 Q. You were not thinking about it in terms of Lehman's book
4 value?

5 A. I was not thinking about it in terms of book value.

6 Q. And when you signed the agreement that described it in
7 terms of a book value "as of the date hereof of approximately
8 seventy billion", you did understand that was a reference to
9 Lehman's book value, yes?

10 A. I couldn't actually say that at the time when I looked at
11 it I thought the word "Lehman" should be inserted before book
12 value. I think that -- I agree that the current market value
13 at the time might have been a better way to describe it. But I
14 don't view this as any different. I didn't view book value as
15 something different. I certainly didn't think it was our book
16 value as of Friday.

17 Q. Did you -- did you --

18 A. I thought our book value was, I don't want to say
19 synonymous, but it was meant to represent the same thing as the
20 current market value at the time.

21 Q. Okay. In your capacity as head of legal compliance and
22 audit, would you have viewed the term "book value" as a term
23 that has a particular meaning?

24 A. I don't know that I viewed it as -- as having a particular
25 meaning at the time.

1 Q. You wouldn't have had a view one way or the other as to
2 whether the term book value had a particular meaning in
3 September of 2008?

4 A. I don't recall zeroing in on that term. In the context of
5 everything that was going on and the record setting time that
6 this agreement was put together, I don't recall zeroing in on
7 the use of word book value as an alternative term.

8 Q. Well, it's up there on the screen to zero in on now, sir.
9 As you look at it --

10 A. But you asked me what I -- at the time and I just --

11 Q. I'm about to ask you another question. As you look at it
12 now, can you see it?

13 A. Yep.

14 Q. Okay. As you look at it now, it has some particular
15 meaning, the phrase "book value", does it not? That's not an
16 ideally chosen phrase, is it?

17 A. I'm not sure whether it was ideally chosen.

18 Q. Do you have any understanding, sir, of whether the term --
19 of how the term "book value" came to be added to the agreement?

20 A. I don't.

21 MR. GAFFEY: Your Honor, may I have one moment to
22 reach for a document?

23 THE COURT: Sure.

24 Q. In the course of your work and the drafting and
25 preparation of the asset purchase agreement, do you recall that

1 there was a version of the asset purchase --

2 MR. GAFFEY: Withdrawn.

3 Q. Do you recall that when you first signed the asset
4 purchase agreement there were handwritten interlineations on
5 it?

6 A. When I first signed it? I don't recall.

7 Q. Do you recall re-signing the agreement after it was
8 conformed in typewriting?

9 A. I don't actually recall that.

10 MR. GAFFEY: Your Honor, may I approach?

11 THE COURT: Yes.

12 MR. GAFFEY: Do you have copies of this?

13 I beg your pardon, Your Honor, my document
14 organization is falling apart a little bit. So, we just have
15 to get copies for Mr. Schiller and the Court.

16 THE COURT: I think we should give Mr. Schiller --

17 MR. GAFFEY: May I approach?

18 THE COURT: -- let's give Mr. Schiller his copy first.

19 MR. GAFFEY: That's what I thought.

20 MR. SCHILLER: Thank you, Your Honor. I appreciate
21 it.

22 MR. GAFFEY: I try not to be rude in the same way
23 twice.

24 May I approach, Your Honor?

25 THE COURT: Yes. Thank you.

1 Q. Now, Mr. Berkenfeld, I put before you what is Movant's
2 Trial Exhibit 118 in evidence. It is the sale motion that was
3 submitted by Lehman's counsel on the 17th of September 2008.
4 And document's a little bit hard to work with, sir, but I'll
5 ask you to take a look at Exhibit A to that sale motion which
6 is the asset purchase agreement. And when you get there, would
7 you go to page 6 for context and then turn to page 7?

8 A. 6 and then 7?

9 Q. Where I'd like you to go is the definition of purchased
10 assets in this version, the asset purchase agreement. I
11 apologize, it has no page numbers. Are you there?

12 A. I believe so.

13 Q. Now, there is the definition of purchased assets, are you
14 with me?

15 A. Um-hmm.

16 Q. Okay. And if you go to the end of that document --

17 A. The end of the document?

18 Q. I beg your pardon, the end of that section overleaf; you
19 see the definition of government securities that we've been
20 talking about in the retyped asset purchase agreement, right?

21 A. The definition of government securities?

22 Q. Well, the definition of purchased assets, subsection (d).

23 A. Right. Which is defined as long positions.

24 Q. And you see there, sir, that the -- that the phrase,
25 quote, "With the book value" on the next page, page 7 -- there

1 we go at the top -- the phrase "With a book value as of the
2 date hereof of approximately seventy billion" and the phrase
3 "collective long positions". Do you see that?

4 A. Yes.

5 Q. You note that they are added by hand in the copy of the
6 asset purchase agreement that was submitted to the Court on the
7 17th of September. Do you see that?

8 A. Yes.

9 Q. Does that refresh your recollection as to whether when the
10 agreement was final, it was in a form where it had not yet been
11 fully typed and there were handwritten interlineations?

12 A. I haven't seen this in a long time. But vaguely I recall
13 that there was a hand draft, but I don't know if I signed this.
14 I just don't recall.

15 Q. Well, you don't have any reason to think, sir, that the
16 agreement that you signed is any different from the agreement
17 that was submitted to the Court do you?

18 A. I have no reason to believe that.

19 Q. So, looking again at the handwritten interlineation, it
20 says, quote, "With a book value as of the date hereof of
21 approximately seventy billion", end quote. Do you recall when
22 the phrase "book value" was added to the agreement?

23 A. I don't -- what I recall about this is that a draft of the
24 agreement just mentioned these securities positions without any
25 value put on them. So, I think at some point in the process

1 people said well, wait a minute, you know, are we talking about
2 all government securities or all corporate equity, all exchange
3 trade derivatives? There was no context.

4 I remember that being added to this and I did look ahead
5 and saw that a similar change was made to the short positions,
6 but it was to add the concept of a value of seventy billion. I
7 don't recall a focus on book value. It wasn't adding the word
8 "book value". It was adding the concept of "with a book value
9 as a date hereof of approximately seventy billion".

10 Q. Okay. Let's agree on the terms we're going to use. It
11 does actually add the term "book value", sir. You see it
12 there, right?

13 A. Not by itself.

14 Q. I understand that. But the term "book value" was amongst
15 the things added to the agreement. You didn't mean to say that
16 wasn't added to the agreement, did you?

17 A. No.

18 Q. Okay.

19 A. The question was when you asked about adding the term
20 "book value" you made it sound to me that the book value was
21 added as a separate addition. And you're taking a change that
22 was made and taking four of the words of it and say when were
23 those four words added without looking at the other ten words
24 or whatever it is.

25 Q. Well, at some point in the drafting and preparation of the

1 asset purchase agreement, it was determined that it was
2 necessary to add a description of the value of the long
3 position, correct?

4 A. Yes.

5 Q. And the words chosen to describe the value of the long
6 position was "book value as of the date hereof of approximately
7 seventy billion". Correct?

8 A. Correct.

9 Q. I take it from your testimony, sir, you're not the guy who
10 decided those are the words that have to go in the agreement?

11 A. I was not the person who said those words had to go in,
12 but in the review late in the process of this agreement, I
13 think I was part of the discussion that we kind of left the
14 open-ended provision here that needs better definition.

15 Q. When you say an open-ended provision, you're talking about
16 that provision without the what's now added by hand?

17 A. The printed part of (d); government securities, commercial
18 paper, mortgage loans, corporate debt, corporate equity,
19 exchange traded derivatives, collateral, short term agreements,
20 but without any sense of all of them, some of them, any kind of
21 context of value.

22 Q. And when you were involved in the discussion about putting
23 in a more precise definition of that collection of securities
24 and commercial paper, etcetera, did you suggest to anyone that
25 it should be described instead of book value as the current

1 market value at the time they are transferred, the term you
2 used before?

3 A. I don't recall suggesting the term "book value" or any
4 alternatives to book value.

5 Q. Well, regardless of who came up with what ultimately was
6 said, sir, I think I heard you say you were in the
7 conversation. You were in the discussion of putting in a more
8 refined agreement -- definition in the agreement, yes?

9 A. Yes. But I don't recall if I was part of the agreement
10 that these would be the right words. I just don't remember.

11 Q. Okay. So, you were in the discussion. You may not have
12 been there when the decision got made?

13 A. I just don't recall.

14 Q. Okay. And having been in the discussion about putting in
15 a more refined, a more definite definition of the assets being
16 transferred, when you reviewed the asset purchase agreement
17 before you signed it, did you take any extra care to see how
18 that drafting issue had been fixed?

19 A. I don't recall where I devoted my focus when I was
20 reviewing it but I don't recall focusing on the words "book
21 value" and say we could come up with a better description. I
22 just don't remember that.

23 Q. Now, let's go back to -- I kind of took myself off on a
24 side road there, sir. I was asking you before we started
25 talking about this definition. If at the time of the

1 transaction you had ever been informed that the economics
2 involved of five billion dollar overall economic loss to Lehman
3 versus its marks. Had you been informed of that when you
4 signed the asset purchase agreement?

5 A. And I answered that in a long way but to give you the
6 short answer --

7 Q. Thank you very much. I appreciate it.

8 A. -- than giving you the long one, I was not informed of
9 that.

10 Q. Okay. And you had never seen any document that said that?

11 A. No. Not that I recall.

12 Q. And when you were involved in drafting the asset purchase
13 agreement, you did not have an understanding that there was to
14 be a discount given at Barclays off the value of the assets to
15 be transferred, is that right?

16 A. Again, I never -- I did not see the word "discount" in any
17 documents. I don't recall anyone using the word "discount". I
18 was not aware of any discount off of the current market
19 valuation.

20 Q. So, you have no knowledge of that either?

21 A. I have no knowledge of that.

22 MR. GAFFEY: And could we put M-2 back up, please?

23 Q. When the schedule was put together, you had no knowledge
24 of the discount in the range of five billion being calculated
25 before the schedule was put together, correct?

1 A. I had no knowledge of a discount.

2 Q. Now, on this schedule, sir, you see that on the liability
3 side, there's a reference to cure payments in the amount of
4 2.25 billion. Do you see that?

5 A. Yes.

6 Q. Did anyone ever suggest to you in sum or substance that
7 when you saw the financial schedule, that the comp and the cure
8 numbers were plug numbers to make it balance?

9 A. No one ever suggested to me that they were plug numbers.

10 Q. And with respect to the -- to these categories of
11 assumed -- did you understand them to be guidance for the
12 liabilities that Barclays would assume pursuant to the asset
13 purchase agreement?

14 A. I didn't really focus on those two parts in the context of
15 the schedule. I think that for those two lines, I look to the
16 asset purchase agreement.

17 Going back to what I testified before, to me, the purpose
18 of the schedule was to allocate the securities positions to be
19 clear, those assets; the governments, the corporate debt, the
20 corporate equity. And the short positions; trading positions.

21 Again, the schedule was not the agreement. It was not
22 meant to be a balance sheet of the deal. It just never had
23 that significance to it; that meaning. And we had a lot of
24 lawyers sitting around the table. We all could have agreed or
25 someone could have suggested let's put this on the back of the

1 agreement. Let's submit it to the Court. None of that was the
2 purpose of this agreement. It was relevant as guidance to how
3 those securities positions should be allocated because without
4 it, there were lots of different ways it could have been
5 allocated. And it was changing and I did initial it and say
6 this one should be final so we have a sense that out of that
7 seventy billion, forty is governments. Not one, not sixty-
8 nine.

9 But with regard to compensation and cure payments, in my
10 mind, the cure payments and the compensation were dealt with
11 specifically in the asset purchase agreement and I would look
12 to the asset purchase agreement in terms of what the
13 obligations of the parties were.

14 Q. Do you have your deposition transcript there?

15 A. Yeah.

16 Q. Would you turn to page 104, please and directing your
17 attention to 104 at line 13 through 105 line 4.

18 MR. GAFFEY: Steve, would you put the schedule up
19 there so he can see its deposition exhibit number? The whole
20 thing. Shrink it.

21 Q. Just before I read that to you, sir, you recall that this
22 schedule we've been talking about today, marked as M-2, was
23 deposition -- Exhibit 19, your deposition? Take a look at the
24 tag on it.

25 A. I'm sorry, the tag 19 on my deposition?

1 Q. No, sir. Take a look at the tab -- actually, if you --
2 can you see the screen?

3 A. Yes.

4 Q. You see that's called "Deposition Exhibit 19" as well?

5 A. Yes.

6 Q. Okay. I just want you to understand the question as I
7 read it to you.

8 A. Okay.

9 Q. And now, back on page 104 of your deposition starting at
10 line 13.

11 "Q. Did anyone ever suggest to you in sum or substance, sir,
12 when you saw the financial schedule marked as Exhibit 19 that
13 the comp and cure numbers were just plug numbers to make it
14 balance?

15 "A. To my recollection, no one had ever suggested that to me.

16 "Q. Was it the contemplation? Was it part of the structure of
17 the transaction that Barclays was, in fact, going to undertake
18 to assume liabilities in roughly the amounts guided by the
19 schedule marked as Exhibit 19?

20 "A. I believe it was the understanding that Barclays would
21 assume liabilities that were at the time estimated roughly to
22 be in this amount."

23 When I asked that question and you gave that answer, was
24 that truthful testimony, sir?

25 A. Yes, it was. I should have said I believe it was my

1 understanding. I can't speak to others, but yes. And I think
2 that's consistent with what I just said.

3 Q. Okay. So, let's go back to the question I asked you a
4 moment ago with regard to Exhibit M-2, the financial schedule.

5 MR. GAFFEY: Can we have that up here, please, Steve?

6 Q. Now, do you recall I asked you a few moments ago whether
7 or not the comp and cure numbers were plug numbers to make this
8 sheet appear to be balanced? You told me, no.

9 A. That's correct.

10 Q. Okay. And then I asked you if whether it was the
11 contemplation, was it part of the structure of the transaction
12 with Barclays, in fact, was going to assume -- was going to
13 undertake to assume liabilities in roughly the amounts guided
14 by that exhibit, M-2?

15 A. I believe my answer was I wasn't looking at the schedule
16 for guidance for that. I wasn't looking to schedule. There
17 was an understanding, my understanding, my impression, that
18 there would be comp and cure payments in about those amounts
19 and my recollection, again, from reading things before
20 testimony was that the numbers that were represented to the
21 Court around comp and cure payments were not those numbers.
22 They were two and half are comp and one and a half are cure, I
23 think. But regardless, the cure payments was something that
24 was going to be determined over time. And there might have
25 been estimates that were made; I'm not sure where they came

1 from. But I didn't view this as a obligation on the part of
2 Barclays to assume cure payment liabilities of 2.25 billion. I
3 didn't think the schedule stood for that. And I didn't think
4 that the schedule stood for that there was an obligation to pay
5 comp for two billion.

6 From the person who initialed it, that's not what I
7 thought this schedule was. I think there were provisions on
8 the asset purchase agreement on those points. It would have
9 been easy enough to incorporate those numbers to get the
10 schedule to bring those numbers into the asset purchase
11 agreement or to make the schedule part of the asset purchase
12 agreement and that wasn't done.

13 Q. And with regard to the schedules, sir, when the agreement
14 that was going to be submitted to the Court was finalized, was
15 it your understanding that Barclays would assume liabilities
16 that were estimated roughly in those amounts?

17 A. My understanding, when it was presented to the Court, was
18 that Barclays could be assuming liabilities up to the amounts
19 that were presented to the Court, not based on what was in the
20 schedule.

21 Q. Now, when you say Barclays could have been assuming
22 liabilities up to the amounts, did you track whether the Court
23 was told that the estimates of liabilities for comp and cure
24 were ceilings as opposed to estimates of what Barclays actually
25 would pay?

1 A. Poor choice of words on my part to say up to but I don't
2 think it was -- I don't recall it being a ceiling. I think it
3 was for cure payments and open-ended question. Dependent on
4 what -- what contracts were going to be assumed and what
5 Barclays felt it needed to conduct the business in the ordinary
6 course.

7 Q. Let's talk about the comp number for a minute. Let's stay
8 away from what contracts would be assumed. We'll come to that.
9 Let's look at the comp number for a minute. Was it your
10 understanding when you signed the asset purchase agreement that
11 Barclays was going to pay compensation amounts in roughly the
12 amount shown on Exhibit M-2, two billion dollars?

13 A. My understanding of the comp amount came from the asset
14 purchase agreement. It didn't come from the schedule.

15 Q. Sir, I'm going to have to ask you look again at page 104
16 of your deposition starting at line 20 and reading over to line
17 4 on page 105.

18 UNIDENTIFIED SPEAKER: Your Honor?

19 THE COURT: Yes.

20 UNIDENTIFIED SPEAKER: Respectfully, I would like to
21 object on the grounds of completeness and ask that my friend
22 read the next question and the next answer as well. That is
23 line 5 on page 105 through line 24 on that page, Your Honor.
24 Thank you.

25 THE COURT: Okay. There's been a request for some

1 additional context.

2 MR. GAFFEY: Can I read what I want, get an answer,
3 and then I'll read that? How's that?

4 THE COURT: That sounds fine to me.

5 UNIDENTIFIED SPEAKER: I object to that.

6 THE COURT: Well, this is -- this is the examination
7 within the movant's case of a current Barclays employee and
8 without getting into who's hostile to whom at this point, I'm
9 going to let the questioning proceed in the manner proposed by
10 Mr. Gaffney over your objection. He'll then read the material
11 that you'd like him to read and, trust me, I can process this
12 information at whatever order it's presented.

13 UNIDENTIFIED SPEAKER: I appreciate it, Judge.

14 THE COURT: Thank you.

15 BY MR. GAFFNEY:

16 Q. So, Mr. Berkenfeld, let's go back to page 104, line 20, of
17 your deposition through 105, line 4.

18 "Q. Was it the contemplation, was it part of the structure of
19 the transaction that Barclays was in fact going to undertake to
20 assume liabilities in roughly the amounts guided by the
21 schedule marked as Exhibit 19?

22 "A. I believe it was the understanding Barclays would assume
23 liabilities that were at the time estimated roughly to be in
24 this amount."

25 Was your testimony in response to that question truthful

1 at the time you gave it?

2 A. Yes, it was and I didn't say in my answer "guided by the
3 schedule". That was in your question. It was not in my
4 answer. I said that "it was my understanding that Barclays
5 would assume liabilities that were at the time estimated
6 roughly to be in this amount" but I didn't think it was guided
7 by the schedule.

8 Q. Let's -- can we -- I just want to go back to this. So,
9 when I ask you was it -- the contemplation, "was it part of the
10 structure of the transaction that Barclays was, in fact, going
11 to undertake to assume liabilities in roughly the amounts
12 guided by the schedule marked as Exhibit 19", are you telling
13 us now your answer had nothing to do with whether it was guided
14 by the schedule marked as Exhibit 19?

15 A. I think the distinction I'm trying to make, which I was
16 making before, is that --

17 Q. Sir, with respect, could I have an answer to the question
18 I asked? My question was when I asked you a question that
19 ended "in roughly the amounts guided by this schedule marked as
20 Exhibit 19", was your answer meant not to relate to the amounts
21 guided by the schedule marked in Exhibit 19? That's a yes or
22 no question, sir?

23 A. Then I guess my answer is, no.

24 Q. So, you understood the question that I asked you "to
25 include whether or not the amounts were guided by the schedule

1 marked as Exhibit 19" when I asked you that question?

2 A. I don't remember what I was thinking at the time but what
3 I was saying was that the amounts, the rough estimates, were
4 consistent. They weren't guided by the schedule. It's a
5 comment I've been making throughout my testimony.

6 The schedule is not the agreement. It wasn't even
7 attached. These numbers weren't brought in. So, I didn't view
8 the deal. Let's talk about the tail wagging the dog. I didn't
9 view the schedule as guiding the deal. The schedule to me had
10 a purpose of allocating assets. The asset purchase agreement
11 was the deal between the parties, not the schedule. It was not
12 meant as a balance sheet of the transaction. I never viewed it
13 that way. I didn't initial it in that context. It doesn't
14 include all the elements of the transaction. It wasn't
15 contemplated that way. And so, at the time of my deposition
16 and today, I consistently say that these decisions weren't
17 guided by the schedule. It makes it sound like the schedule
18 was the agreement between the parties, and it wasn't. The
19 asset purchase agreement was the agreement between the parties.

20 Q. Did it come to your attention during the week when the
21 hearings were held in this court on the 17th and the 19th that
22 the two billion dollar comp number was given to the Court?

23 A. My understanding was that a comp number was given to the
24 Court that originally was higher than the two billion but at
25 the time, I think of Friday was at two billion.

1 Q. And did the two billion dollar number that was given the
2 Court, sir, bear any relation to the two billion dollar number
3 on that schedule?

4 A. Well, the numbers aren't consistent.

5 Q. Okay. Did it bear any relations to the calculation of two
6 billion dollars for comp on that schedule?

7 A. Bear relation, yes.

8 Q. And at some point, I believe by the 17th, that is the time
9 between the preparation of this schedule and the submission of
10 the sale motion, the calculation for cure came to 1.5, reduced
11 from two and a quarter, do you recall that?

12 A. I -- I don't recall how it got from one number to the
13 other. I wasn't part of those discussions.

14 Q. Okay. You do recall the fact that it went from two and a
15 quarter to 1.5?

16 A. I recall that a 1.5 number was presented to the Court.

17 Q. Okay. And you were working closely with the lawyers who
18 were preparing and drafting the asset purchase agreement and
19 who were preparing the sale motion to be submitted to the
20 Court, correct?

21 A. Working closely when?

22 Q. On the 16th of September.

23 A. Well, I described before what I was doing, but this was
24 one piece of many things that I was doing. And so was I with
25 my sleeves rolled up, there around the clock, working through

1 the agreement? No, that's not correct.

2 Q. You had a general idea that estimates for comp and cure
3 were being given to the Court as part of a package of materials
4 submitted to seek the Court's approval of a transaction, yes?

5 A. Yes, that's correct.

6 Q. And was it your understanding that the estimates for comp
7 and cure that were given to the Court as part of the package
8 for seeking its approval were meant to be understood to be
9 estimates of what Barclays actually would wind up paying?

10 A. My understanding, my impression, was that they were rough
11 estimates of what Barclays might be paying. In particular on
12 the cure, though, I think it was -- is extre -- exceedingly
13 rough estimate that there were going to be a lot of factors
14 that were going to weigh into exactly what --

15 Q. Okay.

16 A. -- who was going to pay.

17 Q. And -- but the 1.5 that was given to the Court, rough, I
18 hear what you're saying, but the 1.5 was meant to be an
19 estimate to the Court -- and estimate to the Court of what
20 Barclays could wind up paying in cure amounts?

21 A. My impression of it was it was sort of the -- the best
22 good faith effort -- estimate at the time --

23 Q. Okay.

24 A. -- and could be made at the time.

25 Q. And when you had that understanding that it was the best

1 good faith effort that could be had at the time, did you have
2 any information about what Barclays' plan was with respect to
3 the amounts that it would undertake for contract cure?

4 A. No, I did not.

5 Q. And did you have any information as to Barclays' plan for
6 how much it would spend for compensation?

7 A. No, I did not.

8 Q. And was it known to you when the schedule was prepared on
9 the 16th of September, that the comp amount shown on that
10 schedule was a billion dollars in excess of the amount accrued
11 on Lehman's books?

12 A. I was not aware of that.

13 Q. Did that ever come to your attention before the asset
14 purchase agreement was submitted?

15 A. No, it did not.

16 Q. Just to return a bit, sir, to the top of marking books.
17 If you wanted to know whether the books -- whether Lehman's
18 books accurately reflected market values on the 15th or 16th of
19 September, you would ask the chief financial officer, correct?

20 A. I would start with chief financial officer, Ian Lowitt and
21 the comptroller.

22 Q. And another person you would ask would be Martin Kelly,
23 correct?

24 A. Correct.

25 Q. Now, do you know if the values that were calculated which

1 wound up being collected in this allocation on Exhibit 2 were
2 done an asset-by-asset basis -- an asset class-by-class basis
3 or any other basis?

4 A. I don't know.

5 Q. Did you have any understanding at the time when you signed
6 the schedule?

7 A. No, I -- I don't think I did. I wasn't involved in that
8 process, I wasn't participating or observing. It came to me as
9 more of a completed process.

10 Q. Now, to your knowledge, sir, none of the lawyers involved
11 in the drafting of the asset purchase agreement were aware of
12 any loss on assets in the structure of the deal? Is that
13 correct?

14 A. I'm not sure what you mean by loss on asset?

15 Q. Well, to your knowledge, were any of the lawyers involved
16 in the drafting told anything about a five billion dollar
17 overall loss to Lehman against its marks?

18 A. I believe that -- I -- I don't want to say all the
19 lawyers, but most of the lawyers were aware that the securities
20 positions were worth less than they were on Friday. And if
21 that's what you mean by a loss from Fridays' marks, I think
22 most of the lawyers were aware of that, just aware of what's --
23 was going in the market.

24 Q. So is it correct, sir, that -- or incorrect, that none of
25 the lawyers involved in the drafting were aware of any loss on

1 assets?

2 A. My view on that as you're stating the question is that
3 it's not accurate.

4 Q. Okay. And if I put that in the context of asking you this
5 question: To your knowledge, were any of the lawyers involved
6 in the drafting told anything about a five billion overall loss
7 to Lehman against the marks? Would the statement, "To your
8 knowledge, none of the lawyers involved in the drafting were
9 aware of any loss on assets" be true?

10 A. I -- I'm really not trying to split hairs here. It goes
11 back to the point of was it a loss on assets from marks on
12 Friday versus a loss relating to the transaction. I think that
13 the lawyers knew generally that there was a loss on the
14 positions, the value of the positions since Friday. If you're
15 asking me about another loss around the transaction, I don't
16 know that lawyers knew about that. I'm not sure what you're
17 referring to.

18 I'm trying to be very precise in answering exactly what
19 you're asking me, and -- and the terminology you're using, to
20 me, is ambiguous.

21 Q. And you were trying to be precise when your deposition was
22 taken?

23 A. I was trying to be.

24 Q. You understood that was testimony, just like the testimony
25 you're giving today?

1 A. Yes.

2 Q. Can you turn to page 70 of your deposition? And I'd ask
3 you, sir, to take a look at -- starting at line 20 on page 70
4 and we'll go over to page 71 at line 2.

5 I asked you this question: To your knowledge, were any of
6 the lawyers involved in the drafting told anything about a five
7 billion overall economic loss to Lehman against the marks?

8 Answer: To my knowledge, none of the lawyers involved in the
9 drafting were aware of any loss on assets.

10 Was that a true answer when you gave it?

11 A. Yes, but --

12 Q. Were you trying to --

13 A. -- I think I understand your question to mean, at the
14 time, a loss on the marks as of Tuesday; the then-current
15 marks. And I think you're asking me now about the marks as of
16 Friday. So my -- and --and maybe you intended something
17 different when you asked the question. My reading of this was
18 overall economic loss to Lehman against the marks, and I
19 interpreted marks to mean the then-current marks: Was there a
20 discount to the then-current marks on Tuesday?

21 Q. Okay, because without a qualification, you would assume a
22 reference to the marks to be a reference to the current marks?
23 On the day we're talking about, yes?

24 A. Within the context of that question, yes.

25 Q. Okay. Can we go back to the definition of purchased

1 assets in the asset purchase agreement, please? Page 6 of
2 Exhibit 1. Now would it be a -- given the interpretation you
3 just suggested with regard to your deposition answer, would it
4 be reasonable, sir, to assume that a reader of that clause
5 describing the long position would assume that it meant the
6 book value as shown on the books on the date hereof, that is
7 the 16th of September, 2008?

8 A. Yes. And -- and -- and if you're asking me whether the
9 lawyers knew that the book value as of the date hereof, on that
10 Tuesday, was really seventy-five billion, then this would have
11 some more context to it. But that's not what you asked at the
12 time and I don't think that's what you asked before. This was
13 the view of the book value as of the date of Tuesday and
14 lawyers were not aware, as far as I know, of any discount off
15 of the then-current market valuation that had been agreed to on
16 those securities positions.

17 Q. Now, you don't recall it -- did you at some point during
18 the week, sir, the week leading up to the sale hearing, become
19 aware of a repurchase agreement between Lehman and Barclays?

20 A. Tangentially removed, I was not involved in the -- in the
21 repo financing. I was involved in a lot of other things, but I
22 had delegated that to people who had more expertise in -- in
23 repo financing.

24 Q. All right. And so I take it then, sir, that you had no
25 knowledge concerning how the repo came or didn't come to play

1 any role in the transaction as it ultimately was concluded?

2 A. Not really.

3 Q. Okay. And you had no knowledge of the manner in which or
4 formula by which the assets in the repo were valued, correct?

5 A. I was not involved in that.

6 Q. Okay. Did you attend the sale hearing?

7 A. On Friday?

8 Q. Yes.

9 A. Yes, I did.

10 Q. Did you attend the whole thing?

11 A. Yes, I did.

12 Q. So when a description of the sale was given to the Court
13 at the sale hearing and you heard no reference to the repo
14 other than as an overnight financing device, it wouldn't have
15 struck you that more disclosure might need to be made, is that
16 right?

17 A. It would not have because I wasn't enough involved that I
18 knew much more than what the lawyers were saying in court about
19 it.

20 Q. And you don't recall it coming to your attention during
21 the week of September 15th that there was going to be a mark-
22 down of Lehman's books to reflect a discount off of the Lehman
23 book value? Is that correct?

24 A. Could you repeat the question?

25 Q. Well, do you recall it coming to your attention during the

1 week of September 15th that there was going to be a mark-down
2 of the books to give Barclays a discount?

3 A. A mark-down of the books to give Barclays a discount, in
4 what context?

5 Q. Just -- that's my question, sir.

6 A. I've -- I wasn't familiar with a mark-down of -- of books
7 to give Barclays a discount. No, I was not.

8 Q. And to your knowledge no component of the business
9 terms -- you had no knowledge of any component of the business
10 terms that were agreed upon including a discount off of
11 Lehman's marks, at the time you signed the APA, correct?

12 A. I was not aware of any discount off the then-agreed to
13 current market valuation.

14 Q. And in order to make a full and truthful answer to that
15 question, do you have to add the phrase then-agreed to?

16 A. I think that's the appropriate answer I'd like to give as
17 a full answer.

18 Q. Could you go to your deposition at page 63? And starting
19 at line 14 and working through line 18, sir.

20 Halfway across line 14 I asked this question: To your
21 knowledge did any component of the business terms that were
22 agreed include a discount off those marks? Answer: I'm not
23 aware of any discount off the marks.

24 To be precise in your answer then, you didn't need to add
25 that phrase, the then-current marks. Were you being precise at

1 your deposition?

2 A. Not as precise as I'm being now.

3 Q. Okay. Being more precise now because we're here in the
4 courtroom?

5 A. Yes.

6 Q. You did understand when you gave your deposition it's the
7 equivalent of testimony as sitting in court?

8 A. Yes, sir.

9 Q. Now, to your knowledge, sir, none of the people
10 responsible for making disclosures to the bankruptcy court were
11 told that would be some kind of bulk discount given to
12 Barclays, correct?

13 A. I -- within Weil Gotshal I don't know what information was
14 known and what was disclosed. Weil Gotshal was all over the
15 transaction, they were our deal lawyers on the asset purchase
16 agreement. They have lawyers specifically assigned to the
17 finance department to answer any questions that came up. They
18 asked, you know, we need a lawyer on-call. They were given
19 that.

20 There were lawyers involved in the financing and there
21 were lawyers presented to the bankruptcy court. How
22 communication occurred within Weil and who exactly knew what, I
23 don't know. But we were re -- I was relying on Weil as our
24 counsel for the transaction and our counsel in bankruptcy court
25 to make sure that all material information was disclosed to the

1 court. They were in the best position to know the information
2 and to evaluate the information.

3 Q. Could you take a look at your deposition at page 72, sir?
4 And I'm at page 72, starting at line 22 and going over to page
5 73, line 3:

6 "Q. And to your knowledge, sir, were any of the people
7 responsible for making disclosures to the bankruptcy court told
8 that there would be some kind of bulk discount given to
9 Barclays?

10 "A. Not to my knowledge."

11 Was that a truthful answer when --

12 A. Yes.

13 Q. -- you gave it, sir?

14 A. That's in -- consistent with what I just said --

15 Q. Were --

16 A. -- not to my knowledge.

17 Q. Were you being precise when you gave the answer "not to my
18 knowledge" without an explanation that Weil Gotshal might have
19 known?

20 A. In -- in the context of the deposition and the question
21 you asked? Yes.

22 Q. Okay. So to your knowledge, sir, were any of the people
23 responsible for making disclosures to the bankruptcy court told
24 that there would be some kind of bulk discount given to
25 Barclays?

1 A. Not to my knowledge.

2 Q. And that remained the state of your knowledge through the
3 time from the original notification to court, the original
4 motion through the closing on September 22nd? That nobody
5 responsible for making disclosures to the Court was aware of
6 any bulk discount?

7 A. Not to my knowledge.

8 Q. Okay. And as far as you know, nobody responsible for
9 making disclosures to the Court had knowledge of the discount
10 after September 22nd? What's wrong -- sir, as far as you
11 know, none of the lawyers who described this deal to the Court
12 at any time had any knowledge of a discount. Is that correct?

13 A. To my knowledge, none of the lawyers who described the
14 transaction to the Court, to my knowledge, had any knowledge of
15 a discount. As -- as we've defined it.

16 THE COURT: Mr. Gaffey, we've been at this for just
17 about two hours. I'm wondering whether or not you're going to
18 be much longer. If so, it might be a good time for a break.
19 If you think you're going to be concluding in a relatively
20 short period of time, we'll take a break at that point.

21 MR. GAFFEY: Your Honor, what I -- I think taking a
22 break now would make some sense because I will be able -- I
23 think, if I go through the rest of my outline, to shorten it.

24 THE COURT: Okay.

25 MR. GAFFEY: And then be --

1 THE COURT: Let's take a break.

2 MR. GAFFEY: -- brief when we return.

3 THE COURT: Let's take a break until around 4 o'clock.

4 Let me just give everyone this admonition. I have a scheduled
5 telephone conference at 5:30, which will probably be a forty-
6 five minute conference. If it's absolutely critical that we
7 finish today, I'll see if we can make arrangements to come back
8 at 6:15 to conclude this evening, so as not to have the witness
9 return. But if that's just not feasible and it may not be,
10 based upon the timing of the day, we can end at 5:25 and resume
11 with wherever we are in Mr. Berkenfeld's testimony tomorrow
12 morning.

13 MR. GAFFEY: I can't say, Your Honor. With respect to
14 our next witness, Mr. Miller, he may actually be behind me now.
15 He may not be, but --

16 THE COURT: Well, he did stick his head in. I saw
17 that he is here and he made a brief appearance about ten
18 minutes ago.

19 MR. GAFFEY: he's roughly been apprised, Your Honor,
20 he's been apprised that chances are he's going to have to be
21 testifying tomorrow and I understand he's available. So from
22 the point of view of once we finish with Mr. Berkenfeld, I'll
23 be ready to go in the morning. So, whether Mr. Berkenfeld
24 needs to finish tonight is a function of he and his lawyer.

25 MR. SCHILLER: Mr. Berkenfeld works in the city, he's

1 available tomorrow, Judge. We're happy to break at 5:20 for
2 Your Honor's call.

3 THE COURT: Okay, terrific. Meanwhile, we'll break
4 for about ten minutes.

5 MR. GAFFEY: All right. And if Mr. Miller was out
6 there, I'm going to send him back to Weil Gotshal --

7 THE COURT: You might want to send him back so he can
8 bill some time.

9 MR. GAFFEY: I will do that, Your Honor.

10 (Recess from 3:49 p.m. until 4:05 p.m.)

11 THE COURT: Please be seated.

12 MR. GAFFEY: Thank you, Your Honor.

13 THE COURT: You sent Mr. Miller home?

14 MR. GAFFEY: I did.

15 THE COURT: Good.

16 MR. GAFFEY: With instructions to bill time, as
17 ordered. He seemed quite enthusiastic at the prospect, Your
18 Honor.

19 THE COURT: Regrettably, I don't need to tell him to
20 do that. He can do that on his own.

21 RESUME DIRECT EXAMINATION

22 BY MR. GAFFEY:

23 **Q. Mr. Berkenfeld, could you take a look at Exhibit M-3?**

24 **It's in the binder in front of you; it's in evidence as**

25 **Movants' Exhibit 3, the so-called clarification letter.**

1 A. Yes.

2 Q. Okay. And just for completeness, sir, if you would turn
3 to the signature page for Lehman Brothers Holdings, Inc. Is
4 that your signature there?

5 A. Yes, it is.

6 Q. Okay. And do you recall when you signed this
7 clarification letter?

8 A. To the best of my recollection, it was early Monday
9 morning, I believe, bracketed around 7:30, 8 o'clock in the
10 morning.

11 Q. And when you signed the clarification letter, at the time
12 you signed the letter, you had not developed an understanding
13 of the reason for each and every one of its terms, is that
14 right?

15 A. I -- I think that's a fair characterization.

16 Q. And you did not ask about each and every one of the terms
17 in the clarification letter at the time you signed it?

18 A. There were parts of it I was very familiar with,
19 provisions having to do with for instance, transfer of
20 businesses as opposed to assets, and I had spent a lot of my
21 time from the signing of the asset purchase agreement that week
22 on issues like how we keep on operating, what about businesses
23 like Canada, Israel, Eagle Energy, what was in, what was out,
24 what's -- came in. So I was very familiar with those and was
25 to some extent leading some of the discussions on -- on what

1 should be done with some of those businesses. But some of the
2 others, in particular the provisions around the financing, I
3 was less familiar with.

4 Q. Okay. Generally, you understood -- the portions that you
5 focused on were more long the side of the spectrum concerning
6 the new business deal that had been agreed to, is that right?

7 A. Not the new business deal, the inclusion of -- of
8 businesses, like the private investment management business,
9 whether that was going to be in the deal or not. And that was
10 something that was moving around and -- and some of those
11 businesses like Eagle Energy Commodity Business was originally
12 in the transaction and then was taken out. So my focus from
13 signing to closing was on that. Back to the point of how does
14 Lehman operate and not reflective clarification agreement but
15 the transition services agreement and how would the Lehman
16 estate be able to function post the acquisition of the Lehman
17 Brothers North American business.

18 Q. Now would it be fair to describe the deal reflected in the
19 clarification letter that you signed as a different deal than
20 the one that you signed on the 16th?

21 A. Yes, that would be fair.

22 Q. It would be fair to characterize it as an amended deal, is
23 that correct?

24 A. You could characterize it as amended deal, that's correct.

25 Q. You would characterize it as an amended deal, isn't that

1 right?

2 A. Yes.

3 Q. And among the changes reflected in the amendments of the
4 clarification letter, some of the changes were not immaterial,
5 is that right?

6 A. I think the part of the agreement was the same. That it
7 was a purchase of real estate assets, for an appraised value.
8 There was a payment of 250 million for Lehman Brothers and
9 there was a acquisition of assets and assumption of liabilities
10 to allow Barclays to operate the business in the ordinary
11 course. I think the -- the fundamentals of the transaction, in
12 my mind, were the same.

13 Q. One fundamental aspect of the deal that changed, however,
14 was that you understood that the assets to be transferred had
15 dropped in value, correct?

16 A. I understood that assets with a lower value were being
17 transferred.

18 Q. And that was a combination of -- that was caused by a
19 combination of -- but, some element in the different number was
20 the unavailability of certain assets to be transferred,
21 correct?

22 A. Yes.

23 Q. For example, the Chicago market closed-out positions which
24 prevented assets from being transferred over to Barclays,
25 correct?

1 A. That's going -- I knew about the -- the CME issues, was
2 somewhat involved with that, but really not that close to where
3 some assets were getting held up and -- and couldn't be
4 transferred. It wasn't an area that I was particularly focused
5 on.

6 Q. And understanding when you signed it that it was a
7 amendment to the asset purchase agreement what steps, if any,
8 did you take to ensure that the clarification letter was
9 brought to the Court's attention?

10 A. I went through the clarification letter or discussed it
11 with Weil Gotshal and with Simpson Thacher who were both
12 reviewing it. I got comfort from Weil that it was something
13 that was appropriate to sign. I signed it because at the time,
14 at Weil's offices, I was the only authorized officer of Lehman
15 Brothers Holdings that was there that could sign it. But I
16 don't recall any discussion with Weil about what needed to be
17 disclosed to the Court.

18 Q. And there was no discussion one way or the other about --

19 A. there was no discussion one way or the other. There was
20 not a discussion that we should or that we shouldn't. I just
21 don't remember the subject coming up in my -- in my discussions
22 with Weil Gotshal.

23 Q. To your knowledge, were additional assets added to the
24 transaction by virtue of the clarification letter?

25 A. When you say assets, are you meaning securities positions?

1 Q. I'll take that, sure.

2 A. Not -- I don't -- not that I know of.

3 Q. Okay. Did you have any understanding at the time about
4 the contents of certain clearance boxes being added through the
5 clarification letter?

6 A. No, I didn't. Again, it was beyond my area of expertise
7 and my area of focus.

8 Q. Did you have an understanding at the time about the
9 addition of certain 15c3 assets being added being added through
10 the clarification letter?

11 A. I was not involved in those discussions.

12 Q. If you would take a look at the -- did you have an
13 understanding at the time that the definition of purchased
14 assets was changed through the clarification letter?

15 A. Yes.

16 Q. Okay. And would you take a look -- we'll blow it up on
17 the screen here -- within Purchased Assets, subsection 2, and
18 both on pages 1 and 2, now you see in the clarification letter,
19 sir, there is a change in the definition of purchased assets
20 that makes reference to, in subsection (a), securities owned by
21 LBI and transferred to purchaser or to affiliates under the
22 Barclays repurchase agreement as specified on Schedule A
23 previously delivered by seller and accepted by purchaser. Do
24 you see that?

25 A. Yes.

1 Q. And at the time that you signed the clarification letter,
2 did you have an understanding of what comprised those
3 securities?

4 A. I would say a very general understanding.

5 Q. Was it general -- was it any more specific than the fact
6 that there were some repurchase agreement securities? In other
7 words, did it go beyond the actual language of the letter?

8 A. No, it did not.

9 Q. Okay. You had no knowledge concerning the value of that
10 particular component?

11 A. I had no independent knowledge and I wasn't part of any of
12 those discussions, as that was gener --

13 Q. So I take it then you had no knowledge as to how the
14 collateral on that particular component was valued?

15 A. I did not.

16 Q. Okay. And in subsection (b) of the change in the
17 defini -- in the definition of purchased assets in the
18 clarification letter, there's a reference to sub-securities and
19 other assets held in LBI's clearance boxes as of the time of
20 the closing. Which at the close of business on September 21,
21 2008 were as specified on Schedule B previously delivered by
22 seller and accepted by purchaser. Do you see that?

23 A. Yes.

24 Q. Did you have any understanding of what comprised the
25 securities and other assets held in LBI's clearance box at the

1 time you signed the clarification letter?

2 A. Not with any specificity. Not the L -- what was in the
3 clarification letter.

4 Q. Same question. Did --

5 A. Yes.

6 Q. -- what is said here is what you knew and you had no
7 knowledge beyond that, correct?

8 A. That's correct.

9 Q. Okay. So I take it then that you had no knowledge as to
10 the value of the securities and other assets held in the
11 clearance boxes at the time you signed the clarification
12 letter?

13 A. That's correct.

14 Q. And then the next logical issue, of course, is you didn't
15 have any knowledge as to how or by what formula the securities
16 and other assets in the clearance box were valued?

17 A. Right, I had no knowledge one way or the other.

18 Q. Okay. And as to both the contents of the repo collateral
19 and the contents and the clearance boxes, you had no knowledge
20 as to who had conducted any valuations regarding those two
21 categories of securities, correct?

22 A. That's correct.

23 Q. Now sir, at the time that you signed the asset purchase
24 agreement, your understanding of the transaction as reflected
25 in the asset purchase agreement was that Barclays would not on

1 acquisition, have an immediate excess value in the assets that
2 were being transferred to it, is that correct?

3 A. We weren't thinking of the agreement that way. We weren't
4 really looking at it from Barclays' standpoint. We were
5 thinking of the -- of the transaction from Lehman's standpoint,
6 so the issue of whether or not Barclays had a gain was not
7 something that I discussed with any of the Barclays
8 representatives or any the Lehman principals one way or the
9 other.

10 It was my impression that -- I didn't -- I really --
11 really didn't know if there was going to be a gain. I think
12 that the agreement didn't require it, it didn't guarantee it,
13 but it didn't require a guarantee of loss, either. And neither
14 was a gain or a loss precluded. But I don't -- it's really not
15 the way we were thinking about it. But it was not my
16 understanding at the time I signed it that -- I didn't know how
17 Barclays was account (sic) for it, I didn't know if there would
18 be a gain to them one way or the other.

19 Q. Okay. I want to go back to the verb I think I used in my
20 question. To your understanding of the transaction -- was it
21 your understanding of the transaction that on acquisition, as
22 reflected in the asset purchase agreement, it was not intended,
23 intended, that Barclays would have an immediate excess value in
24 the assets that they were bringing over?

25 A. I don't know what was intended but it was my impression

1 that there wasn't an immediate gain on acquisition.

2 Q. Did you have any thoughts about what was intended when you
3 signed the agreement?

4 A. My thoughts of what was intended when I signed the
5 agreement were from Lehman's perspective. What were we
6 accomplishing for Lehman. I wasn't really focused on whether
7 Barclays was going to have a gain or not, short-term or long-
8 term. I expected that there would be a gain, ultimately,
9 because I believe that the franchise value of Lehman was -- was
10 worth more than 250 million. If they were able to keep the
11 team together, if the markets would normalize, I thought over
12 time there'd be value. That was my impression. But the focus
13 was what are we doing for Lehman. What are we doing for the
14 estate, what are we doing for the employees? And not really
15 what Barclays was going to -- how Barclays was going to account
16 for this.

17 Q. Well, I'm not actually asking about the long-term value.
18 I'm asking about on acquisition. At the time you signed the
19 asset purchase, was it intended by the agreement that on
20 acquisition Barclays would have a gain?

21 A. I don't think the agreement, as you said intended by the
22 agreement, I don't think the agreement addresses it one way or
23 the other. I think the agreement, as I said, didn't require
24 it, it didn't preclude it. It didn't preclude a loss, either.
25 I don't -- I don't think the agreement as drafted had anything

1 to do with gain or loss to Barclays.

2 Q. Could you take a look at your deposition on page 112? And
3 directing your attention to the question beginning at line 7,
4 concluding through the answer ending at line 25:

5 "Q. I'm not actually asking about the long-term value. If it
6 operates what it bought while it makes money in the long-term,
7 great. I'm asking whether it was, whether the transaction was
8 in your mind when you signed it, was it structured so that
9 Barclays would enjoy a gain because of the excess of the fair
10 value of the net assets it acquired over the consideration that
11 Barclays paid?"

12 There's an objection and then this question:

13 "Q. Not whether it was going to long-term be successful
14 operating the business, on acquisition?

15 "A. My understanding of the transaction is that on
16 acquisition, as reflected in the asset purchase agreement, it
17 was not intended that Barclays would have an immediate excess
18 value in the assets that they were bringing over."

19 Was that after a testimony when you gave it, sir?

20 A. It was and the question you asked me --

21 Q. And were you giving it the same degree --

22 A. -- before was, was it intended by the agreement. I did
23 not understand your question to be was it intended by the
24 agreement. Was the agreement drafted so that there would be a
25 gain to Barclays, or excess value to Barclays. That's the

1 question you asked me before and that's why I talked about the
2 agreement, not having a -- as -- as far as I understood, my
3 impression, there was not an intent. But I didn't discuss that
4 with the principals and so I don't know what the intention of
5 the Barclays principals were or some of the Lehman principals.
6 It just wasn't a discussion that I had one way or the other.

7 Q. Let me just read your answer again and ask you if it's an
8 accurate statement of your testimony, beginning at line 21:

9 "My understanding of the transaction was that on
10 acquisition as reflected in the asset purchase agreement, it
11 was not intended that Barclays would have an immediate excess
12 value in the assets that they were bringing over."

13 Is that a true statement?

14 A. That was true as to my understanding.

15 Q. And to your knowledge, it was not intended in any part of
16 the deal as it evolved between the 16th of September through
17 when it closed on the 22nd? Is that correct?

18 A. Intended by whom? I can't answer a question with a
19 predicate, but --

20 Q. Let's start with the parties to the agreements that you
21 signed, sir.

22 A. I --

23 Q. Those parties.

24 A. I didn't have a discussion one way or the other with
25 anyone from Barclays or any of the Lehman principals where it

1 was communicated to me that there would be a gain or a loss in
2 the agreement -- from the agreement, from this transaction to
3 Barclays.

4 A. To your knowledge, to your knowledge --

5 A. To my knowledge.

6 Q. -- it was not intended in any part of the deal as it
7 evolved from the 16th through the 22nd that there would be a
8 gain on acquisition for Barclays? Yes or no.

9 A. My impression, my understanding was that there was not
10 excess value in the assets that were being transferred over. I
11 didn't really know how Barclays was going to account for it.

12 Q. And you didn't understand it to be an imperative of the
13 transaction that there be a first day gain for Barclays,
14 correct?

15 A. That is correct.

16 MR. GAFFEY: I have nothing further, Your Honor.

17 MS. TAGGART: No questions from the committee.

18 MR. MAGUIRE: If it please the Court.

19 CROSS-EXAMINATION

20 BY MR. MAGUIRE:

21 Q. Mr. Berkenfeld, my name is Bill Maguire. I represent the
22 SIPA trustee. You testified a little bit about the
23 clarification letter and you mentioned that you had -- you had
24 signed that.

25 A. Correct.

1 Q. Were you present for the closing?

2 A. I was present at the time the agreement was signed, yes.

3 Q. And were you --

4 A. Clarification letter, excuse me.

5 Q. Were you provided with an execution page?

6 A. Yes.

7 Q. And you signed the execution of page?

8 A. Yes.

9 Q. And where was that?

10 A. At the offices of Weil Gotshal in their conference center.

11 Q. And where in the conference center?

12 A. In one of the conference rooms.

13 Q. You mentioned that you had been present for the entire
14 sale here?

15 A. The sale in the Court on Friday?

16 Q. Yes.

17 A. That's correct.

18 Q. So from the time that the sale herein concluded in the
19 early hours of Saturday morning until the time of the closing
20 in Weil Gotshal's conference center on Monday morning, you were
21 not aware of any significant changes to the deal between the
22 parties?

23 A. Well, I was aware of the terms of the clarification
24 letter, if that's what you're asking. When -- when I -- there
25 were drafts of a clarification letter that were going around

1 that weekend after I left the hearing , went home, worked from
2 home all day and again answered hundreds of questions about
3 what was included in the bankruptcy, what was it, what was
4 going on with different assets.

5 The clarification letter was being worked on by the
6 lawyers, the outside counsel. I was not that directly involved
7 in it, but I knew that changes were being made and I knew that
8 the clarification letter ultimately on Sunday reflected changes
9 to -- some changes to the agreement, the asset purchase
10 agreement.

11 Q. And, sir, you refer to changes in the clarification letter
12 in your answer just now. If you turn to your deposition
13 transcript, at page 154, starting at line 3, you were asked the
14 following question and you gave the following answer:

15 "Q. In the weekend, that's the Saturday the 20th and Sunday
16 the 21st, were there significant changes made in the terms over
17 the weekend leading to the Monday?

18 "A. Not that I recall."

19 That was a true answer then, was it not, sir?

20 A. Yes.

21 Q. Is that still a true answer?

22 A. I don't recall if the changes were significant or not,
23 over the Saturday 'til I came into Weil Gotshal's offices on
24 Sunday.

25 Q. Do you have Movants' Exhibit 3, the clarification letter

1 in the binder before you? If you turn to the second page of
2 the letter, sir. And just for context, at the very top of the
3 page, there's a carry over from the first page and it continues
4 the description of purchased assets. I'd like you, sir, to
5 focus on the last two lines of that paragraph on the page.
6 You'll see right after the words "exchanged traded
7 derivatives," I've -- there's a parenthetical. Do you see
8 that, sir?

9 A. Yes.

10 Q. And that parenthetical reads and I quote: "and any
11 property that may be held to secure obligations under such
12 derivatives." You're with me, sir?

13 A. Yes.

14 Q. Now it's true, is it not, that you were not aware what the
15 business deal was between the parties that is reflected in that
16 parenthetical?

17 A. That is correct.

18 Q. You've no knowledge whether indeed there was any business
19 deal with respect to that parenthetical?

20 A. I have no knowledge of the meaning of that par --
21 parenthetical and where it originated from.

22 Q. And specifically, sir, you are not aware of any business
23 agreement between Lehman and Barclays to transfer Lehman's
24 margin assets to Barclays?

25 A. I'm not -- I'm not aware of it.

1 Q. You are aware that the Court was told during the sale
2 hearing that there was no cash being transferred to Barclays?

3 A. I think that the reference -- I remember that being said,
4 that the reference to cash was in terms of the cash that was
5 originally part of the purchased assets and that that amount of
6 cash that was in the asset purchase agreement as one of the
7 purchased assets was no longer part of the transaction.

8 I don't remember if there was a broader comment about no
9 cash in any other context being transferred over or not as --
10 as collateral or -- or margin, I don't know. I think the cash
11 that I recall at the hearing had to do with unencumbered cash
12 on the balance sheet.

13 Q. There was an exclusion for cash in the asset purchase
14 agreement, was there not?

15 A. There was in the original asset purchase agreement, there
16 was actually cash that was going with the transaction.

17 Q. You're referring to the retained cash?

18 A. I don't recall the definitions off-hand.

19 Q. You recall that this was an asset purchase agreement?

20 A. Yes, but I don't know if it was called retained cash, I'd
21 have to look back at the asset purchase agreement.

22 Q. Okay. So I'll represent to you that there was a -- that
23 there was an exclusion for cash and cash equivalents in the
24 asset purchase agreement, okay?

25 A. As I recall, there was some cash excluded and some cash

1 included in the asset purchase agreement.

2 Q. And the cash that was included was ultimately dropped out
3 of the agreement, do you recall that?

4 A. Yes, I do.

5 Q. And you are not aware of any business deal between the
6 parties over the weekend of the clarification letter to add
7 Lehman's cash into the purchased assets?

8 A. I'm not aware of any.

9 Q. Thank you, sir.

10 MR. MAGUIRE: No further questions.

11 THE COURT: Mr. Schiller, it's cross-examination.

12 CROSS-EXAMINATION

13 BY MR. SCHILLER:

14 Q. Good afternoon, Mr. Berkenfeld.

15 A. Good --

16 Q. Jonathan Schiller for Barclays. I want to ask you to open
17 the book my friend gave you to the transcript section.

18 A. Yes.

19 Q. And to page 63.

20 A. Yes.

21 Q. If you recall, you were asked to read -- you were asked
22 about questions that began on page 62, line 20 and you gave an
23 answer: "My understanding is that they were based on the
24 marks." Do you see that? Top of 63?

25 A. Yes.

1 Q. And I raised a question about completeness inappropriately
2 at the time, so I would like to return to that and ask you to
3 read the question and answer, lines 6 through 11:

4 "Q. Did they say something to you? Answer: I don't exactly
5 recall what they said. "Yeah," from the examiner.

6 "A. But it was in the delivery of the schedule and what it
7 represented as an estimate for purchased assets and assumed
8 liabilities."

9 Do you see your answer there?

10 A. Yes.

11 Q. Are those -- that question -- the answer to those
12 questions was accurate?

13 A. Yes.

14 Q. And were you referring when you referred to the estimate
15 of purchased assets that assume liabilities, the process that
16 you described with negotiations between the parties on Monday
17 and Tuesday?

18 A. Yes.

19 Q. Again, you were asked at page 104 and 105, would you turn
20 to that in the transcript please. You were asked a question
21 beginning at line 13 through your answer at page 105. And the
22 question was: "Did anyone ever suggest to you that sum or
23 substance, sir, when you saw the financial schedule marked as
24 Exhibit 19 that the comp and the cure were just plugged numbers
25 to make it balanced?"

1 "A. To my recollection, no one had ever suggested that to me.

2 "Q. Was it a contemplation, was it part of the structure of
3 your transaction that Barclays was in fact going to undertake
4 to assume liabilities in roughly the amounts guided by the
5 schedule marked as Exhibit 19?"

6 You remember that question?

7 A. Yes.

8 Q. In that colloquy with my friend? And your answer: "I
9 believe it was the understanding the Barclays would assume
10 liabilities that were at the time estimated roughly to be in
11 this amount."

12 And then you went on to answer the next question. And let
13 me bring that to your attention. Again, at line 5, was the
14 question:

15 "Q. And the liabilities -- well, at that Barclays -- I don't
16 want to hold you to that exact set of the number" -- my friend
17 said -- "that level of specificity. But the liability that
18 Barclays would assume would be roughly in the neighborhood of
19 the comp, cure and comp, for cure and comp would be roughly in
20 the neighborhood of the cure and comp amounts shown on the
21 financial schedule as guidance."

22 And you answered: "As of the date of this agreement, I
23 believe it was the understanding that there were liabilities
24 being assumed by Barclays, some of which could be estimated
25 with more precision than others. Certain of the securities

1 positions, for instance, could be estimated with more
2 precision, but that the obligation of Barclays from where to be
3 set forth in the purchase agreement, not determined by the
4 schedule." Is that your answer?

5 A. Yes, it was.

6 Q. Was it accurate then?

7 A. Yes.

8 Q. Is it accurate today?

9 A. Yes.

10 Q. Let me ask you to turn to the first tab of Movants' book
11 that they put in front of you, which is the agreement, the APA.
12 DO you have it?

13 A. Yes.

14 Q. Incidentally, before I do that, let me go back to your
15 schedule for just one second. It's just the next tab. And
16 Exhibit 19 -- did your schedule list all of the assets that
17 Barclays was acquiring through this sale?

18 A. No, it did not.

19 Q. Now let's go back to the APA if you will. Please turn to
20 page 6 of the asset purchase agreement.

21 A. Okay.

22 Q. Do you see the definition of purchased assets? And I know
23 it has been put before you and the Court extensively today, so
24 I will try to be brief. You see there's a long list of asset
25 categories, all listed under the heading "Purchased Assets" on

1 page 6 and running through page 7, correct?

2 A. Yes.

3 Q. Now, I'll represent to you without you having to count
4 that there are nineteen such categories. Did the schedule you
5 initialed and wrote "final" on include all of those asset
6 categories that are found in the APA?

7 A. No, it did not.

8 Q. Let me ask you to look at the purchased asset definition
9 and ask you whether subparagraph (b) all deposits, et cetera --
10 is that reflected on your schedule?

11 A. No, it's not.

12 Q. Please go below that, (c) the transferred real property
13 leases together with all improvements, fixtures and other
14 pertinences thereto. Is that included on your schedule?

15 A. No, it's not.

16 Q. (e) fifty percent of each position in the residential
17 estate mortgage securities, and we've heard a lot about the
18 residential mortgage securities, haven't we?

19 A. Yes.

20 Q. Is that reflected on your schedule?

21 A. That, I believe, is reflected in the schedule.

22 Q. The furniture and equipment, subparagraph (f), is that
23 reflected on your schedule?

24 A. No, it's not.

25 Q. Is it your understanding that under the purchase

1 agreement, those assets would transfer to Barclays upon
2 closure?

3 A. Yes.

4 Q. Did you expect that those assets had value?

5 A. Yes.

6 Q. Did the contract estimate a value?

7 A. No, it did not.

8 Q. Did your schedule estimate that value?

9 A. No, it did not.

10 Q. If Barclays recognized value in its acquisition accounting
11 after the sale, would that be inconsistent with your
12 understanding of the transaction?

13 A. It would not be inconsistent with my understanding.

14 Q. If you turn to subsection (i) -- and that refers to
15 customer lists, I hope. You see that in the middle of little
16 (i) --

17 A. Yes.

18 Q. -- on page 7? Is that reflected -- that asset reflected
19 on your schedule?

20 A. No, it's not.

21 Q. And was it your understanding under the purchase agreement
22 that Barclays was entitled to those lists and all other assets
23 in little (i)?

24 A. Yes.

25 Q. And did you expect that the customer list had value to the

1 going concern following the sale?

2 A. My expectation would be that they did have value to
3 Barclays.

4 Q. Did the contract between Lehman and Barclays estimate that
5 value anywhere on its face?

6 A. No, it did not.

7 Q. Did the schedule you initialed?

8 A. No, it did not.

9 Q. If Barclays recognized value from customer lists with
10 respect to the assets in its acquisition accounting, would that
11 be inconsistent with your understanding of the transaction?

12 A. No, it would not.

13 Q. Please turn to page 8 of the APA, if you would. You see
14 at subsection (q), the definition of purchased assets lists
15 "all past and present good will and other intangible assets
16 associated with or symbolized by the business."?

17 A. Yes.

18 Q. Is that category of assets listed anywhere on the
19 financial schedule you initialed on September 16th?

20 A. No, it's not.

21 Q. But would those assets transfer to Barclays under the
22 purchase agreement, as far as you were concerned?

23 A. Yes, they were transferred to Barclays.

24 Q. And if Barclays were to assign a value to those assets in
25 its acquisition accounting, would that be consistent with the

1 APA?

2 A. It would not be inconsistent.

3 Q. And if Barclays -- withdraw that.

4 Did Barclays buy all the assets used in the business
5 including the assets listed on pages 6 through 8?

6 A. The agreement provided that -- I'm going back to the
7 beginning --

8 Q. Page 6.

9 A. Page 6, that they buyer was buying all the assets of the
10 seller used in connection with the business, excluding the
11 excluded assets and then it listed some of the examples of
12 those assets that were used in connection with the business --

13 Q. Okay.

14 A. -- the objective was to allow Barclays to operate the
15 business in the ordinary course.

16 Q. And for the Court's reference, do you see the word
17 "including" in the sentence?

18 A. Yes, right before the -- the colon.

19 Q. And you -- could you turn to -- briefly to page 10 of the
20 APA? And you'll see toward the bottom of that page, there is a
21 definition of the word included.

22 A. Yes.

23 Q. Please read that. The word including or

24 A. The word --

25 Q. -- any variation thereof means including without

1 limitation. You see that?

2 A. Yes.

3 Q. Was is your understanding that these assets would come
4 without limitation, those that were included before, per this
5 definition?

6 A. It is my understanding that the asset purchase agreement
7 were transferring assets used in the business. The list of
8 assets that were included in the subsections did not exclude
9 any other assets by the limited list -- inclusion of a list.

10 Q. Is there any value, anywhere in the APA for any of the
11 purchased assets except the so-called long positions?

12 A. Not that I recall.

13 Q. In terms of the short positions, is there a valuation?

14 A. The short positions that were being assumed?

15 Q. Yes.

16 A. Not -- the -- is there a valuation on the schedule?

17 Sorry.

18 Q. In the contract, anywhere --

19 A. In the contract, there is a provision that says sixty - -
20 approximately sixty-nine billion for the short positions.

21 Q. With regard to the long positions, and you were examined
22 perhaps for an hour on that provision, did you have any
23 discussions with anyone concerning the word book value in that
24 description of long positions?

25 A. Not that I recall.

1 Q. Did you have any discussions with anyone at the time
2 concerning the use of the words book value in the description
3 of the assets?

4 A. Not that I recall.

5 Q. Now you were asked about whether the contract was intended
6 to convey gain or loss and you provided testimony on your views
7 of that. Going back to that area of your direct examination,
8 was there any representation or warranty in the purchase
9 agreement concerning the value of the assets that Barclays was
10 going to acquire in this sale?

11 A. No, there was not.

12 Q. Is there any representation that you know of concerning
13 the value of the assets and liabilities in the deal?

14 A. Not that I know of.

15 Q. I think you've said that the week of the 15th through the
16 22nd was a very volatile week in the financial markets, right?

17 A. Correct.

18 Q. Was there a great deal of uncertainty about the value of
19 the assets in Lehman's portfolio, during the period September
20 15 through September 22nd?

21 A. The securities positions, yes.

22 Q. Now, notwithstanding the volatility with respect to those
23 positions, this contract contains no mechanism to ensure any
24 particular profit or loss outcome for either Lehman or
25 Barclays, correct?

1 **A. Correct.**

2 **Q. Thank you very much.**

3 MR. SCHILLER: Thank you, Your Honor.

4 THE COURT: Is there any redirect?

5 MR. GAFFEY: No redirect from the debtor, Your Honor.

6 THE COURT: Mr. Berkenfeld, you're excused.

7 THE WITNESS: Thank you.

8 THE COURT: Maybe we shouldn't have sent Mr. Miller
9 home.

10 MR. GAFFEY: I'm not inclined to go get him, Your
11 Honor.

12 THE COURT: All right, and I'm not inclined to suggest
13 that you do. Is there anything else for this afternoon?

14 MR. GAFFEY: I've not got anything to begin or add at
15 this point, Your Honor, having such a short cross --

16 THE COURT: Fine. We can all enjoy the unexpectedly
17 free afternoon between a quarter to 5 and 5:30 and I'll see you
18 tomorrow morning at 9:30.

19 MR. GAFFEY: Thank you, Your Honor.

20 (Whereupon these proceedings were concluded at 4:45 p.m.)

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I N D E X

T E S T I M O N Y

WITNESS	EXAM BY	PAGE	LINE
Bart McDade	Mr. Boies	18	24
Bart McDade	Mr. Gaffey	62	9
Bart McDade	Mr. Boies	96	11
Bart McDade	Mr. Gaffey	100	19
Steven Berkenfeld	Mr. Gaffey	101	22
Steven Berkenfeld	Mr. Maguire	199	19
Steven Berkenfeld	Mr. Schiller	204	12

E X H I B I T S

NO.	DESCRIPTION	ID.	EVID.
Movants' 254	E-mail to Tim Sullivan with spreadsheets attached		87

R U L I N G S

DESCRIPTION	PAGE	LINE
Barclays' motion for an order compelling document production from LBHI and SIPA trustee denied	12	1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X, cont'd

R U L I N G S

DESCRIPTION	PAGE	LINE
Barclays' motion for an order compelling	14	11
Document production from creditors' committee		
granted		

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET**D-486)

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Date: April 29, 2010